TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 628

SLAB FORK COAL COMPANY, SCOTIA COAL & COKE COMPANY, SOUTH SIDE COMPANY, ET AL., APPELLANTS,

vs.

NEW RIVER COMPANY, WHITE OAK FUEL COMPANY, STUART COLLIERY COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

FILED NOVEMBER 4, 1923.

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[fol. 1] IN THE

DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA AT CHARLESTON

In Equity

THE NEW RIVER COMPANY, a Corporation; WHITE OAK FUEL Company, a Corporation; Stuart Colliery Company, a Corporation; Dunnloop Coal & Coke Company, a Corporation; Beckley Coal & Coke Company, a Corporation; Mabscott Coal & Coke Company, a Corporation; Cranberry Fuel Company, a Corporation, Plaintiffs,

versus

THE CHESAPEAKE & OHIO RAILWAY COMPANY, a Corporation; The Virginian Railway Company, a Corporation, and The United States of America and The Interstate Commerce Commission, Defendants, and Slab Fork Coal Company, a Corporation; Scotia Coal & Coke Company, a Corporation; South Side Company, a Corporation; Turkey Knob Coal Company, a Corporation; Coal Run Coal Company, a Corporation; Branch Coal Company, a Corporation; Beechwood Coal and Coke Company, a Corporation; Greenwood Coal Cmpany; a Corporation; Laurel Creek Coal Company, a Corporation; Quinnimont Coal Company, a Corporation; Maryland-New River Coal Company, a Corporation; Star Coal & Coke Company, a Corporation; Ephriam Creek Coal & Coke Company, a Corporation, and Stover Coal Company, a Corporation, Intervening Defendants.

TRANSCRIPT OF THE RECORD

James W. Carmalt, Esq., A. G. Guthein, Esq., A. C. Burnham, Esq., and C. W. Dillon, Esq., for complainants and appellees; and George T. Bell, Esq., for intervening defendants and appellants.

Be it remembered that heretofore, to wit: On the 29th day of January, A. D., 1923, came the complainants by their solicitors and filed in the office of the Clerk of the District Court of the United States for the Southern District of West Virginia, at Charleston, their bill of complaint, and the said bill of complaint having later been amended, by leave of the Court, the said bill of complaint as amended, etc., is in the words and figures as follows:

[fol. 2] IN THE DISTRICT COURT OF UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

BILL OF COMPLAINT AS AMENDED—Filed Jan. 29, 1923

To the Honorable the Judges of the District Court of the United States for the Southern District of West Virginia, sitting in equity:

I. Your complainants, The New River Company, White Oak Fuel Company, Stuart Colliery Company, Dunnloop Coal & Coke Com-[fol. 3] pany, Beckley Coal & Coke Company, Mabscott Coal & Coke Company, Cranberry Fuel Company, all West Virginia corporations, bring this proceeding in equity against The Chesapeake and Ohio Railway Company, a corporation, and The Virginian Railway Company, a corporation, for the purpose of enjoining, preventing and restraining them from applying a certain rule for distributing coal cars at the mines of your complainants and others similarly circumstanced, known as Rule 4 of Circular CS-31 Revised, in violation of their common law obligation as common carriers to furnish transportation in interstate commerce upon terms and conditions as favorable as those given by said common carriers, and each of them, for like traffic under similar conditions to other shippers and of the same obligation as defined in the Interstate Commerce Act, approved February 4, 1887 (24 Stat. L. 379), as amended, including the amendments to said Interstate Commerce Act contained in the Transportation Act, 1220, approved February 28, 1920 (41 Stat. L. 456).

And against the United States and the Interstate Commerce Commission to enjoin, set aside and annul the decision, ruling and order of the Interstate Commerce Commission issued under date of December 11, 1922, in proceedings brought by your complainants and designated as New River Company, et al., vs. The Chesapeake and Ohio Railway Company, Interstate Commerce Commission Docket No. 12083, and New River Company, et al., vs. The Virginian Railway Company, Interstate Commerce Commission Docket No. 12084, and the order of the Interstate Commerce Commission issued under date of April 15, 1920, upon the Commission's own motion in the regulation of car service in so far as said decisions, rulings and orders of the Interstate Commerce Commission authorize or require the said carriers, defendant herein, to publish and apply the rule [fol. 4] of car distribution aforesaid, which said decisions, rulings and orders of the Interstate Commerce Commission were and are in excess of its statutory powers and were and are arbitrary and without warrant of law and, therefore, void.

And in support hereof your complainants allege and show:

II. Your complainant, The New River Company, is a corporation of the State of West Virginia which controls, by stock ownership

of all of the stock, the other corporations herein joined with it as complainants, to-wit:

White Oak Fuel Company, a corporation of the State of West Virginia, operating bituminous coal mines within the said State, known as Scarbro, Whipple and Oakwood, which said mines are served severally by each of said carriers defendant herein in the transportation of goods, including coal and coke, in interstate commerce;

Stuart Colliery Company, a corporation of the State of West Virginia, operating bituminous coal mines within said State, known as Summerlee and Lochgelly, which said mines are served severally by each of said carriers defendant herein in the transportation of goods, including coal and coke in interstate commerce;

Dunnloop Coal & Coke Company, a corporation of the State of West Virginia, operating a bituminous coal mine within the said State, known as Dunnloop, which said mine is served severally by each of said carriers defendant herein in the transportation of goods, including coal and coke, in interstate commerce;

Beckley Coal & Coke Company, a corporation of the State of West Virginia, operating a bituminous coal mine within said State, [fol. 5)] known as Beckley, which said mine is served severally by each of said carriers defendant herein in the transportation of goods, including coal and coke, in interstate commerce;

Mabscott Coal & Coke Company, a corporation of the State of West Virginia, operating a bituminous coal mine within said State, known as Mabscott, which said mine is served severally by each of said carriers defendant herein the transportation of goods, including coal and coke, in interstate commerce;

And Cranberry Fuel Company, a corporation of the State of West Virginia, operating three bituminous coal mines within said State, known as Cranberry No. 1, Cranberry No. 2 and Cranberry No. 3, all in the State of West Virginia, which said mines are each of them served severally by each of the carriers defendant herein in the transportation of goods, including coal and coke, in interstate commerce.

III. The Chesapeake and Ohio Railway Company, defendant herein, is a corporation of the State of Virginia, having its usual place of business in the State of West Virginia, engaged as a common carrier in the transportation of passengers and property, including coal, wholly by railroad between points in the State of West Virginia, including the locality of the mines of your complainants, and points in various other States, in interstate Commerce and as such common carrier is subject to the provisions of the Act of Congress approved February 4, 1887, known as the interstate Commerce Act, and of acts amendatory thereto and supplementary thereof, including the Act known as the Transportation Act, 1920, approved February 28, 1920.

[fol. 6] IV. The Virginian Railway Company, defendant herein, is a corporation of the State of Virginia, having its usual place of business in the State of West Virginia, engaged as a common carrier in

the transportation of passengers and property wholly by railroad between points in the State of West Virginia, including the mines of your complainants aforesaid and points in various other states in interstate commerce and, as such common carrier, is subject to the provisions of the Interstate Commerce Act, approved February 4, 1887, and Acts amendatory thereto and supplementary thereof, including the Act known as the Transportation Act, 1920, approved February 28, 1920.

V. The Chesapeake and Ohio Railway Company and The Virginian Railway Company are independent common carriers each having access by its own rails or through trackage rights to the mines of your complainants and each of them and are engaged in the carriage of the coal, coke and other goods in competition as such carriers from said mines to the Atlantic seaboard and other points of destination in other States in interstate commerce.

VI. The mines of your complainants aforesaid are located in Fayette and Raleigh counties, West Virginia, in the heart of a field of bituminous coal production wherein is mined and produced a low volatile bituminous coal known as semi-anthracite or smokeless coal of West Virginia. In addition to the mines of your complainants [fol. 7] aforesaid there are many other mines in the State of West Virginia producing the same quality of coal served in interstate commerce in some cases by both lines of railroad and in very many other cases served singly by one or the other of the carriers defendant herein. All of said mines, whether local to one line of railroad or served by each of them, are in active competition in the marketing in other states of smokeless coal produced and mined in West Virginia and transported in interstate commerce by said The Chesapeake and Ohio Railway Company and said The Virginian Railway Company; the said coal areas wherein said smokeless coal is produced are known locally on the lines of the defendant carriers as the New River District.

VII. The Interstate Commerce Commission is the administrative tribunal created by said Interstate Commerce Act for the administration thereof, and whose authority, powers and limitations are in said Act defined.

VIII. The provisions of the Interstate Commerce Act apply to common carriers engaged in the transportation of passengers or property in interstate commerce wholly by railroad or partly by railroad and partly by water when both are used under a common control management or arrangement for a continuous carriage or shipment. (Paragraph 1-A, Section I.)

The term "Transportation," as used in the Interstate Commerce Act, includes locomotives, cars and other vehicles, vessels and all instrumentalities or facilities of shipment or carriage, irrespective of [fol. 8] any ownership or contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing,

storage and handling of property transported. (Paragraph 3 of Section I.)

By the Interstate Commerce Act it is provided that it shall be the duty of every common carrier subject to the Act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor and to establish through routes and just and reasonable rates, fares and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes. (Paragraph 4 of Section I.)

By the Interstate Commerce Act it is made the duty of all common carriers to establish, observe and enforce * * * just and reasonable regulations and practices affecting * * * the facilities for transportation * * * and all other matters relating to or connected with the receiving, handling, transportation, storing and delivery of property subject to the provisions of this Act which may be necessary or proper to secure the safe and prompt receipt, handling, transportation and delivery of property subject to the provisions of this Act upon just and reasonable terms and every unjust and unreasonable classification, regulation and practice is prohibited and declared to be unlawful. (Paragraph 6 of Section I.)

The term "car service" in the Interstate Commerce Act is defined to include the use, control, supply, movement, distribution, exchange, interchange and return of locomotives, cars and other vehicles used in the transportation of property * * * by any carrier by railroad subject to this Act. (Paragraph 10 of Section I.)

[fol. 9] It is provided by the Interstate Commerce Act that it shall be the duty of every carrier by railroad subject to this Act to furnish safe and adequate car service and to establish, observe and enforce just and reasonable rules, regulations and practices with respect to car service, and every unjust and unreasonable rule and regulation with respect to car service is prohibited and declared to be unlawful. (Paragraph 11 of Section I.)

It is provided by the Interstate Commerce Act that it shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines, or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. (Paragraph 12 of Section I.)

By the Interstate Commerce Act the Interstate Commerce Commission is authorized, by general or special orders, to require all carriers by railroad subject to this Act, or any of them, to file with it from time to time their rules and regulations with respect to car service and the Commission may, in its discretion, direct that such rules and regulations shall be incorporated in their schedules showing rates, fares and charges for transportation, and be subject to any or all of the rules relating thereto. (Paragraph 13 of Section I.)

By the Interstate Commerce Act it is provided that the Commission may, after hearing on a complaint, or upon its own initiative without complaint, establish reasonable rules, regulations and practices with respect to car service by carriers by railroad subject to this Act, in- [fol. 10] cluding the compensation to be paid for the use of any locomotive, car, or other vehicle not owned by the carrier using it, and the penalties or other sanctions for non-observance of such rules, regulations or practices. (Paragraph 14 of Section I.)

By the Interstate Commerce Act it is provided that it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic in any respect whatever or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. (Paragraph 1 of Section III.)

By the Interstate Commerce Act it is provided that nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute but the provisions of this Act are in addition to such remedies. (Section 22; 22 Stat. L. 379.)

The obligations of carriers with respect to the distribution of cars are further defined in the Interstate Commerce Act in connection with the provision for an additional remedy to enforce such obligation, as follows:

"That the circuit and district courts of the United States shall have jurisdiction upon the relation of any person or persons, firm, or corporation, alleging such violation by a common carrier, of any of the provisions of the Act to which this is a supplement and all Acts amendatory thereof, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against said common [fol. 11] carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ: Provided, That if any question of fact as to the proper compensation to the common carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper, pending the determination of the question of fact: Provided, That the remedy hereby given by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by this Act or the Act to which it is a supplement." (Section 23; 25 Stat. L. 855.)

IX. Pursuant to the provisions of said Interstate Commerce Act, in last preceding article set out, each of carriers defendant herein for many years has established and applied rules for the distribution of

its coal cars among its shippers during recurring periods when the supply of cars available for distribution for transportation of coal among the coal mines served by it not equal the requirements of such mines, which said rules provided for the ratings of said mines and the distribution of cars to them so that each mine served by said carrier in the region should receive its just and reasonable proportion of the cars available on said railroad for distribution to the coal mines served by it. Prior to Federal control during the period of the war each of the defendant carriers, by its rules, provided for the rating and distribution of its cars among the mines without reference to the car supply that was furnished by any other carrier. The ratings of all [fol. 12] mines under said rules represent, for purposes of car distribution, the daily capacity of the mines to produce and ship coal.

X. By proclamation, dated December 26, 1917, the President took possession and assumed control of the railroads of the carriers defendant herein and operated the same through the Director General of Railroads from January 1, 1918, to and including February 29, 1920. Under said proclamation the railroads of the United States were permitted to be operated and were operated under the control and direction of the United States solely according to war needs, and so far as the United States might choose in combination as if they constituted a single carrier, regardless of the obligations of said roads when operated as independent and competing carriers according to the law when not under such Federal control. During the period of said Federal control the Director General of Railroads published and put in force through his Car Service Section, and applied rules for the rating of coal mines other than anthracite and for the distribution of available empty cars to said mines. The said rules were contained in a circular of said Car Service Section known as Circular CS-31. Rule 2 of said Circular CS-31 provided:

"Copies of orders for cars for a mine that is joint with any other carrier (steam, electric or water) shall be filed with the designated representative of each such carrier, such combinations of orders must not exceed the gross daily rating of the mine."

The rules contained in the circular aforesaid were subsequently revised and republished and put in force in Circular CS-31 Revised, [fol. 13] effective January 10, 1919. In said Circular CS-31 Revised the rule that had theretofore applied as Rule 2 in the original circular was republished and put in force and applied without change in verbiage but was designated as Rule 4 of the rules for the distribution of cars to coal mines in CS-31 Revised.

Said Rule 4, as contained in said Circular CS-31 Revised was continued in force and applied by the Director General of Railroads to the end of Federal control. Copy of the said circular CS-31 Revised is hereto appended as Appendix A.

XI. On February 29, 1920, the railroads of the United States were released from the Federal control under said proclamation of the President; by circular dated March 2, 1920, the Interstate Commerce

Commission recommended that the carriers, both those defendant herein and all others subject to the Interstate Commerce Act, continue in force the said Circular CS-31 Revised until such time as the experience of the carriers or the Commission should dictate other and more appropriate rules for the rating and distribution of cars to coal mines; and in accordance with and in compliance with said action of the Commission, the rules of said circular were continued in force by the carriers defendant herein.

Under date of April 15, 1920, the Interstate Commerce Commission, acting under its emergency powers, as defined in Paragraph 15 of Section I of the Interstate Commerce Act, ordered and directed the carriers to modify one of the rules contained in said Circular CS-31 Revised, which said modification is not here involved, but otherwise recommended that the other rules of said Circular, including Rule 4 aforesaid, be continued in force and applied; and in ac- [fol. 14] cordance with and in compliance with said action of the Commission, the rules of said circular were continued in force by the carriers defendant herein.

XII. On or about July 8, 1920, the carriers defendant herein applied to the Interstate Commerce Commission for permission to abrogate Rule 4 and to put into effect the rule laid down in the Illinois case.

This application was refused by the Commission and because of said refusal said Rule 4 was continued in effect by the carriers defendant herein.

Thereafter on, to-wit: January 11, 1921, your complainants filed complaints before the Interstate Commerce Commission separately against The Chesapeake and Ohio Railway Company and the Virginian Railway Company respectively, alleging that said Rule 4 of Circular CS-31 Revised was unjust and unreasonable in violation of Section I of the Interstate Commerce Act as amended, particularly Paragraphs 11 and 12 of said Section 1, and unduly preferential of complainant's competitors and prejudicial of complainants in violation of Section III of said Act. These two cases are known, respectively, as Interstate Commerce Commission Docket Nos. 12083 and 12084. The above numbered separate complaints were consolidated with each other and certain other similar complaints, known as Interstate Commerce Commission Dockets Nos. 12081 and 12082, and were assigned for hearing, brief and argument and decision to Division V of the Commission; were duly briefed, heard and argued before said Commission and the decision of the Commission thereupon was issued by said Division V on June 21, 1921, Fairmont and [fol. 15] Cleveland Coal Company vs. B. & O. R. R. Co., 62 I. C. C. 269. Copy of said decision is hereto appended as Appendix B.

In said decision the Commission found that said Rule 4 of Circular CS-31 Revised was unjust and unreasonable and unduly prejudicial of complainants and others similarly circumstanced and unduly preferential of the mines on each of the carriers defendant herein that were served singly by each such carrier; held and found that a certain rule laid down in the case of In re Irregularities in Mine Rat-

ings, 25 I. C. C. 286, known as the Illinois case, was the just and proper rule and, while stating "We have not required that car service rules be filed as tariff schedules," directed as follows: "We shall expect, however, that defendants will promptly amend their car service rules so as to conform with our findings and evidence same by filing copies thereof with us."

XIII. The Commission in said decision found that a certain rule of car distribution, in lieu of said Rule 4 of Circular CS-31 Revised, to wit: the rule of the Illinois case, would be just and reasonable, and authorized and directed the carriers to establish and apply said rule in the future. This rule, so authorized and directed, limited the right of your complainants on days when they ordered cars from both their connections to order from each only 75 per cent of the mine rating. In reliance on and pursuant to such authority and direction the carriers defendant herein amended their car service rules so as to conform with said findings of the Commission and filed the said Illinois rule of car distribution. By said action of the Commission said Rule 4 was abrogated and the Illinois rule came for the time being into effect as the rule prescribed by the Commission.

[fol. 16] XIV. Complaints substantially similar to those involved in Dockets 12081-12084 were filed by certain operators of mines, similiarly circumstanced, located in Illinois and Indiana, against carriers serving mines in those states, which said complaints were known as Interstate Commerce Commission Dockets Nos. 12362 and 12399, respectively, and are collectively known as Bell & Zoller Coal Company, et al., vs. Baltimore & Ohio Southwestern Railroad Company, et al. Hearing was duly had upon said latter numbered complaints and a tentative report upon such record was made by an examiner of the Commission in which it was proposed to confirm the decision in the Fairmont & Cleveland Coal Company cases, Dockets Nos. 12081-12084. Petition had in the meantime been filed to reopen for further consideration Dockets Nos. 12081-12084 and the Commission did reopen said cases and consolidate the same for argument with the records made in the Bell & Zoller Coal Company cases. Argument was had upon the records thus consolidated in all of these cases before the Commission and on December 11, 1922, the Commission entered its decision, ruling and order, copy of which is hereto appended as Appendix C. Said decision is known as Bell & Zoller Coal Company, et al., vs. Baltimore & Ohio Southwestern Railroad Company, et al., which case includes the cases, Dockets Nos. 12081-12084, and will hereinafter be referred to as the Bell & Zoller decision. In its decision, ruling and order (Appendix C) the Interstate Commerce Commission found, in reversal of its previous decision, ruling and order, that Rule 4 of Circular CS-31 Revised was not "in principle unjust or unreasonable or unduly prejudicial" and that "our former conclusions in the Fairmont cases—are reversed" and the Commission entered an order to dismiss [fol. 17] the complaints in all of the cases recited in which an abrogation of said Rule 4 had been sought and previously granted. By thus reversing its previous conclusions and directions in the Fairmont

case the Commission annulled as of the date of December 11, 1922, its previous action by which it abrogated Rule 4, and substituted the Illinois rule therefor, and thereby, by its own action, re-established Rule 4 as the rule to be followed by the railroads. In its decision the Commission found inter alia:

"The operation of Rule 4 is shown by the following example: A joint mine with a gross daily rating of 50 cars located on carriers A and B orders all of its cars from carrier A which has an 80 per cent car supply. The joint mine will receive the same number of cars as a local mine with a daily rating of 50 cars on carrier A. However, if carrier B has a 50 per cent car supply and the joint mine divides its order equally between the two carriers it will receive 80 per cent of 25 cars, or 20 cars, from carrier A, and 50 per cent of 25 cars, or 12.5 cars, from carrier B, a total of 32.5 cars compared with 40 cars received by the local mine on carrier A. Should the joint mine order more than half its cars from the carrier with the greater car supply this will change the figures somewhat, but in no instance will the joint mine receive as many cars as the local mine served by carrier A if the orders are divided. The complainants concede that the joint mine will, in the aggregate, receive more cars than the local mine located on the carrier with the lesser car supply, and it possibly may receive more cars on the average than the local mines of similar rating on both carriers."

By said decision, order and ruling of the Commission each of the carriers, defendant herein, is authorized and required to limit its car service to your complainants, and others similarly circumstanced, [fol. 18] below the car service which it furnishes to the local mines served by it, as in said Commission's report set out, and said limitation of obligation is arrived at, as to each carrier, by reason of car service and transportation furnished to your complainants, and others similarly circumstanced by another independent and competing carrier.

Under said decision, order and ruling if any of your complainants in time of car shortage has availed itself of its right of shipment by the carrier which has the largest available percentage of car supply, to ship so much of its coal as said carrier can take and then desires to ship the remainder of its goods by the other independent and competing carrier, said other carrier is prohibited from giving any transportation service whatever to said complainant solely because of the first carrier having taken a portion of the goods which your complainant has desired to ship by it. Thus if one of your complainants desires to ship all its coal to the Atlantic seaboard by one of said carriers and orders cars therefor and said carrier, by reason of having only an 80 per cent car supply is able to transport only 80 per cent of said coal, the other of said carriers on whose line your complainant is located, and which has a 40 per cent car supply, and by whom your complainant desires to ship the balance of its coal to the Atlantic seaboard, is prohibited from giving any transportation service to your complainant although to other shippers located on its road, desiring to ship coal by it is giving a 40 per cent service.

XV. Acting under and because of said decision, order and ruling of the Commission of December 11, 1922, and as your complainants are informed and believe and therefore allege, in fear and duress of [fol. 19] the penalties imposed by law in case of violation of any decisions, orders or rulings which the Commission is authorized to make, the carriers, defendant herein, have put in force, and notified your complainants that they have put in force Rule 4 of Circular CS-31 Revised, effective in the case of The Chesapeake and Ohio Railway Company on February 10, 1923, and in the case of The Virginian Railway Company on February 1, 1923.

XVI. On, to-wit, January 11, 1923, your complainants, joined with certain other operators of coal mines similarly circumstanced, filed with the Interstate Commerce Commission a petition to reopen said proceedings known as Dockets 12081-12084, inclusive, but the Interstate Commerce Commission has failed to take any action thereon and the decision, ruling and order made December 11, 1922, and the action of the carriers, defendant herein putting in force, effective February 1 and February 10, respectively, said Rule 4, continue in full force and unmodified.

XVII. The mines of your complainants are in large part deep shaft mines which required for their opening and development a large capital investment much in excess of that required for the opening or development of the ordinary drift or slope mine; said shaft mines carry a large overhead charge and by reason of the capital expenditure required in their development and said large overhead charge are peculiarly dependent for successful and profitable operation upon continuous and steady operation at or near their capacity and upon transportation facilities and service which will permit of this.

[fol. 20] The properties where said mines were developed lay between the locations of The Chesapeake and Ohio and The Virginian Railways and were readily capable, by the building of short railroad lines, of being brought into connection with both of said trunk lines. An investment of large sums was made in the development of said mines and the building by the investors therein of two railroads, to-wit, the White Oak Railway and the Piney River and Paint Creek Railroad, to connect the mines with both trunk lines in reliance on the geographical location of said properties being such that they were capable of being served and would be entitled to be served by both of said lines, and in reliance on securing, by the full service of each of said lines as a competing and independent carrier, the transportation facilities which were essential to the successful operation of the properties. In 1917 after said White Oak Railway and Piney River and Paint Creek Railroad had been operated for a period of five years by The Chesapeake and Ohio and The Virginian as joint lessees, during which time the mines located in the leased lines had had from each of said lessors full transportation service free from the restrictions as to such service now imposed by said Rule 4, said railroads were, at the solicitation

of the trunk lines, sold and conveyed one to The Chesapeake and Ohio Railway Company and the other to The Virginian Railway Company with full reciprocal trackage rights for a period of 99 years granted by each purchasing trunk line to the other trunk line, thereby assuring for said period of 99 years full access by both trunk lines to the mines located on each of the purchased roads. The stock of both the White Oak Railway Company and the Piney River & Paint Creek Railroad Company, as well as the stock of the complainant mining companies whose properties had been developed and connected with the trunk lines by the construction of [fol. 21] said railroads, was then owned by The New River Company as it had previously been by the New River Fuel Company, of which The New River Company was the successor.

In order to assure to the mines located on said roads the continued full service of both of said trunk lines essential to their successful operation, it was stipulated by The New River Company that as part of the consideration for said sale an agreement should be entered into by The Chesapeake and Ohio Railway Company and The Virginian Railway Company, respectively, with The New River Company that the trackage rights to be reciprocally granted by each purchasing trunk line to the other trunk line over the railroads purchased should be maintained in full force and effect for said period of 99 years, and that all the terms of said trackage agreements should during said period be fully performed and observed by the trunk lines; it was also stipulated that the proposed agreement of purchase and sale, including said agreement with The New River Company as to the continuance of the trackage agreement, and said trackage agreement itself, should not go into effect until they had been submitted to the Interstate Commerce Commission for its consideration and formal or informal approval. All of said agreements were so submitted, and the Interstate Commerce Commission making no objection thereto, the sale was consummated in accordance with said agreements. By said agreement entered into by said The Chesapeake and Ohio Railway Company and The Virginian Railway Company the right was vested in The New River Company to the continuance of the full service of said carriers over said road to the mines and properties located thereon. The denial of said service by either of said carriers on account or by reason of certain shipments having been made over the other of said carriers, constitutes an unlawful denial of the service which by said agreement was in- [fol. 22] tended to be secured and was secured to The New River Company for the mines located on said purchased railroads.

XVIII. There is at the present time a shortage of cars on both the defendant carriers, neither having currently a supply of cars available for the loading and transportation of coal equal to the requirements therefor of the mines served by it, including the mines of your complainants.

XIX. If said carriers furnish cars only in accordance with said decision, ruling and order of December 11, 1922, and said Rule 4 of CS-31 Revised, the supply of cars so furnished will be entirely

inadequate to transport the coal which the mines of your complainants have been developed to produce and are producing and which they have available for shipment and desire to ship.

XX. Your complainants desire to use each defendant carrier to ship in interstate commerce the full amount of coal which said carrier can receive and transport for your complainants on a parity with others offering a similar amount of tonnage to said carrier for such shipment, and your complainants and each of them are prepared to ship and desire to ship by each of said carriers coal in excess of the amount which said carrier can transport on such a parity. Your complainants are prepared to pay and offer to pay in the manner provided by law the freight charges on all coal which the defendant carriers will accept for shipment.

[fol. 23] XX. Said decision, ruling and order of the Interstate Commerce Commission of December 11, 1922, and said Rule 4 put into effect by the defendant carriers in compliance therewith, constitutes an encroachment upon and a curtailment and denial of the legal right of your complainants and each of them to the service of a common carrier in interstate commerce on a parity with other shippers offering similar shipments to said carrier and of the carrier's legal duty and legal and property right as a common carrier to serve your complainants as such common carrier and deprives your complainants, and each of them, of their property and legal rights without due process of law and of the equal protection of the laws assured by the constitutions and laws of Virginia, of West Virginia and of the United States.

XXII. Said decision, ruling and order and said Rule 4 are discriminatory against your complainants and each of them as producers and shippers of a certain particular commodity, to-wit: coal, as against shippers of other classes of merchandise who, throughout the United States, when by their geographical location they are able to ship by more than one common carrier, have and enjoy the right of service as to transportation of goods which they desire to ship by and offer for shipments to one of said carriers on a parity with other shippers offering similar shipments by said carrier, which said service they have and enjoy regardless of what shipments may have been made of other goods by another carrier.

[fol. 24] XXIII. Said decision, ruling and order of December 11, 1922, and said Rule 4 imposes the obligation on a common carrier to inquire and ascertain what shipments have been made in interstate commerce by a shipper through another and independent and competing carrier and, if a certain amount of coal has been shipped by said independent and competing carrier, entirely to deny and refuse any transportation in interstate commerce to the shipper tendering goods for shipment or partly to deny and refuse such transportation if some shipments have been made by such other competing carrier, thereby permitting and requiring such carrier to discriminate against a shipper who has made use of a com-

peting common carrier and in favor of a shipper who deals exclusively with one of the competing carriers, and such discrimination is contrary to the laws of the United States and of the States of Virginia and West Virginia.

XXIV. Said decision, ruling and order of December 11, 1922, authorizes and requires each of two competing and independent common carriers, when a certain particular commodity, to-wit, coal, is produced and offered for shipment to any extent in excess of what the car supply of such carriers makes it possible for them to transport, to cease to act as a separate and independent carrier and to cease as such to furnish to shippers tendering goods to it equal and proportionate service according to the goods offered to it and the cars which it has available and authorizes and requires the two competing and independent carriers to act in combination one with the other, and, in such combination together, to give to the shipper only [fol. 25] such service as he would be entitled to if the two independent carriers were in fact a single corporate carrier; and, if one of said carriers has transported a certain amount of goods for the shipper, authorizes and requires the other carrier to refuse any transportation of goods tendered to it. It is contrary to the laws of the United States and of the States of Virginia and West Virginia for two independent and competing carriers thus to combine to limit the facilities which, as common carriers, they will afford to shippers tendering to them separately as independent common carriers goods to be shipped; there is no power vested by law in the Interstate Commerce Commission to authorize or require by a decision, ruling or order two railroads which are independent and competing carriers serving the same territory, to thus act and operate in combination, and in such combination so to limit facilities which a shipper offering for shipment goods to them separately as independent carriers is by law entitled to; and such combination and limitation is in violation of the laws and statutes of the United States and of the States of Virginia and West Virginia and constitutes under said laws and statutes an illegal combination in restraint of trade and commerce and of interstate trade and commerce, and it is a violation and denial of the legal right of each of your complainants to deal with an independent common carrier as such, and to have transportation from each such carrier without discrimination because of other shipments which it has made by another separate and independent common carrier.

XXIV. The Interstate Commerce Commission has by said decision, ruling and order of December 11, 1922, attempted to curtail and deny the legal right of a shipper to transportation service in in- [fol. 26] terstate commerce from a common carrier on a parity with other shippers offering similar goods for shipment, for the purpose of bringing about what a majority of said Commission now conceives to be a desirable adjustment of labor conditions as between different mines; no authority is vested by law in said Commission to adjust mine labor conditions or to use its powers of regulation of railroads and common carriers, directly or indirectly, for any such

purpose; said decision, ruling and order of the Commission is in fact arbitrary, unjust and unreasonable in its effect upon mine labor conditions in that it will, in times of car shortage as compared with times of full car supply, disproportionately affect and curtail the production of mines accessible to two or more carriers as compared with those accessible to only one carrier, thereby disorganizing the labor and production organization of said mines accessible to and customarily availing themselves of the services of two or more carriers, and if allowed to take effect will seriously curtail production of coal in the United States in that, through the great variation which it arbitrarily and artificially imposes on the production of mines which are so located as to be accessible to two or more roads and which normally use and have been developed to use the transportation service of said two or more roads, it will demoralize the labor and production organization of such mines so as to render it impossible for them to retain a working force and organization proportional to their normal capacity and output.

XXVI. It is a common law, statutory and property right of each of your complainants to have goods which it desires to have shipped by a common carrier in interstate commerce accepted and received [fol. 27] for transportation without discrimination as to transportation and car supply between it and other shippers desiring to have similar goods shipped by the same carrier and there is a reciprocal legal duty and obligation on the carrier, regardless of what shipments the shipper may have made of other goods over another competing road, to receive and ship the goods offered by a shipper on a parity with other parties so offering goods to it for shipment and without discrimination between parties so tendering such shipments; if your complainants are deprived of the transportation rights to which they are entitled their investments and property in the mines owned by them and which are dependent on such transportation will be lost or seriously impaired.

XXVII. No right or power is by law vested in the Interstate Commerce Commission to deprive a shipper of his right, on a parity with others offering goods for shipment, to the service of a common carrier, or to prohibit the carrier from performing such service, and the decision, ruling and order of December 11, 1922, of the Interstate Commerce Commission and the denial by The Chesapeake and Ohio Railway Company and The Virginian Railway Company, under duress of said decision, ruling and order made by the Interstate Commerce Commission as hereinbefore stated, of service in interstate commerce to your complainants on a parity with other shippers is without warrant in law.

XXVIII. The curtailment in accordance with said decision, ruling and order of December 11, 1922, and said Rule 4 of the said trans- [fol. 28] portation service in interstate commerce of the defendant carriers to your complainants and each of them, will it said decision, ruling, order and rule are permitted to operate, result in great loss and irreparable damage to your complainants and each of them and

your complainants have no plain, sufficient and adequate remedy at law and can have adequate relief only through the exercise of the equity powers of this honorable court.

XXIX. Your complainants and each of them are organized as to capital investment, mine development, supplies and equipment, working capital, administrative organization, labor force, housing facilities and selling organization to mine, handle and market the full amount of coal which, with the full service of each of said defendant carriers as an independent and competing carrier without discrimination between your complainants and other shippers offering shipments to said carriers, your complainants are entitled to by reason of the geographical location of their mines and the access of each of said carriers thereto; and your complainants have entered into contracts for the sale of coal based on the output which the furnishing of such facilities would enable them to transport and market. Said investment and organization have been made and said contracts have been entered into by your complainants and each of them in reliance on the transportation which they are lawfully entitled to from each of the carriers defendant and which they have uninterruptedly had and enjoyed for a long period of years, except during the period of Federal control when the railroads of the United States, including those of the defendant carriers, were operated as a unit solely according to war needs, and for a short period after the termination of said period of Federal control, during which said Rule [fol. 29] 4 was permitted by the Interstate Commerce Commission to remain in force, and except as the car supply of your complainants was by the original decision in the Fairmont case restricted slightly in comparison with the restriction now attempted to be imposed. If said Rule 4, CS-31 Revised, is permitted to be applied your complainants will suffer great and irreparable damage in the loss of returns on their investment, wastage and disuse of their equipment, wastage and lack of use for their houses and supplies, laying off, demoralization and loss of their labor force, lack of employment and demoralization of their selling organization, loss of the profits under existing contracts by reason of inability to deliver the coal contracted to be delivered thereunder, damage claims for non-delivery, and loss of sale of coal and contracts of sale which, except for the denial and refusal of the transportation facilities to which they are entitled your complainants are in position to make.

I. Wherefore, your complainants, and each of them, pray: That there be ordered and granted by the court a temporary stay or suspension of the operation of said decision, ruling and order of December 11, 1922, of the Interstate Commerce Commission and of said Rule 4 of Circular CS-31 Revised.

II. That a temporary or interlocutory injunction be issued, restraining and enjoining, until the further order of this court, the United States of America and the Interstate Commerce Commission from enforcing or applying said decision, ruling and order of December 11, 1922, and said United States of America and Interstate

Commerce Commission and said The Chesapeake and Ohio Railway Company and the said The Virginian Railway Company, and each of them, from enforcing or applying said Rule 4 of Circular CS-31 [fol. 30] Revised, or from restricting the supply of cars to your complainants, or any of them, in accordance with said rule.

III. That this court adjudge, order and decree that Rule 4 of Circular CS-31 Revised, now published by the carriers defendant herein, effective as of February 1, 1923, and February 10, 1923, respectively, is in violation of the legal rights of your complainants, and each of them, to transportation service from each of said carriers in interstate commerce and is null and void and without warrant in law, and that same be set aside and annulled.

IV. That this court adjudge that the decision, order and ruling of the Interstate Commerce Commission of December 11, 1922, in so far as it authorizes or requires the carriers defendant herein to put in operation said Rule 4 of Circular CS-31 Revised, or to restrict the transportation service and the furnishing of cars by said carriers defendant in accordance with said decision, order and ruling of December 11, 1922, or in accordance with said Rule 4 of Circular CS-31 Revised, is beyond the lawful right or authority of the United States of America and the Interstate Commerce Commission and is without warrant in law and is null and void, and that said decision, order and ruling of December 11, 1922, and said Rule 4 of Circular CS-31 Revised be set aside and annulled.

V. That the United States of America and the Interstate Commerce Commission and the carriers defendant, each and all, be perpetually restrained and enjoined from restricting, in accordance with said decision, ruling and order of December 11, 1922, of the Interstate Commerce Commission and with Rule 4 of Circular CS-31 Revised, the transportation service in interstate commerce and of said carriers defendant to your complainants and from so restricting the said service by or through any other decision, ruling, order or rule to the same effect.

[fol. 31] VI. That your complainants, and each of them, may have such other and further relief as to equity may appertain and as may be deemed by this honorable court fit and proper.

The New River Company, By Robert H. Gross, President. White Oak Fuel Company, By Robert H. Gross, President. Stuart Colliery Company, By Robert H. Gross, President. Dunnloop Coal & Coke Company, By Robert H. Gross, President. Beckley Coal & Coke Company, By Robert H. Gross, President. Mabscott Coal & Coke Company, By Robert H. Gross, President. Cranberry Fuel Company, By Robert H. Gross, President.

Affidavit of Robert H. Gross to above paper omitted in printing.

[fol. 32] APPENDIX A TO BILL OF COMPLAINT

United States Railroad Administration

Director General of Railroads

Chesapeake & Ohio Railroad

Circular CS-31 (Revised)

Richmond, Va., Jan. 6, 1920.

To all coal operators:

The following rules are promulgated to govern uniformly the rating of coal mines (other than anthracite) and car distribution to such mines. They will supersede the rules contained in Car Service Section Circular CS-31, issued at Richmond, Va., October 4, 1918, and are effective beginning January 10, 1920:

Rules for Rating for Car Distribution Purposes Coal Mines (Other Than Anthracite) Loading Coal at Mine Tipples

The following rules shall govern the rating of coal mines (other than anthracite) as the basis for the distribution of empty cars to such mines during periods of car shortage:

(a) The daily capacity of each mine (other than mines covered by paragraphs b and c) shall be determined by taking the total coal tonnage shipped by the mine during the preceding month, dividing it by the number of hours worked in producing it (see paragraph e) and multiplying the quotient by the number of hours in the recognized work day (not more than ten hours) of the individual mine. [fol. 33] The result shall be termed the "daily rating" of such mine, and shall be the basis on which cars shall be distributed to it during periods of car shortage.

(b) The daily capacity of a mine which is served jointly by or for two or more carriers (steam, electric or water) shall be determined by taking the total tonnage shipped by the mine via all such carriers during the preceding month, dividing it by the number of hours worked in producing it (see paragraph e) and multiplying the quotient by the number of hours in the recognized work day (not more than ten hours) of the individual mine. The result shall be termed the "gross daily rating" of such mine, and shall be the basis on which cars shall be distributed to it during periods of car shortage; provided, that if track or other limiting conditions further restrict its ability to ship via the Chesapeake & Ohio Railroad, such conditions shall be the limiting factor for the Chesapeake & Ohio Railroad's daily rating of such mine.

(c) The daily capacity of a mine delivering part of its output to a coking plant, to locomotives at the tipple or to local trade shall be determined by taking the total coal tonnage shipped in railroad cars during the preceding month, dividing it by the number of hours

worked (see paragraph e) and multiplying the quotient by the number of hours in the recognizd work day (not more than ten hours) of the individual mine. The result shall be termed the "daily ratin" of such mine and shall be the basis on which cars shall be distributed to it during periods of car shortage.

(d) When the fires are withdrawn from part (or all) of the ovens at an operation coking part of its output, for the purpose of shipping coal production formerly used in charging ovens, the daily rating of the mines shall be increased to include the average tonnage per day so diverted in the previous month, until the beginning of the next rating period, at which time the daily rating of the mine shall be determined in accordance with paragraph a or c, due allowance being made for such average tonnage so diverted in computing the new [fol. 34] daily rating. A corresponding decrease of the mine's rating will be made when the ovens are again placed in blast.

When a mine that has been coking its entire output desires to ship coal and the fires are withdrawn from part (or all) of its ovens, it shall be given a daily rating for coal shipments corresopnding to the average tonnage of coal formerly coked until the beginning of the next rating period, at which time the daily rating of the mines shall be determined in accordance with paragraph a or c.

(e) In determining the number of hours worked in each day at a mine, time will be counted from the established time for beginning work (or the actual time if earlier or later than the established time) on the tipple until the dumping of coal finally ceases for the day, making deductions for the noon intermission when it is taken, and for the time lost by reason of being blocked with loads, waiting for additional empty cars, or other railroad disability; provided, that if a greater number of hours is worked in the mine than on the tipple, the mine hours must be reported also, and the number of hours worked in the mine must then be used as the number of hours worked in producing the coal. (See paragraphs a, b, and c.) Time may may be deducted for railroad disability only when such railroad disability actually reduces the quantity of coal dumped that day. Time may be deducted when tipple is used for dumping coal into locomotives only when the tipple can not be simultaneously operated for loading cars.

(f) Daily ratings determined in accordance herewith will be revised monthly and made effective on the 10th of the month following the month's performance on which the rating is determined.

(g) If a mine be idle for a period of one full calendar month or more, the last rating determined will be the rating when work is resumed, provided the mine conditions be substantially the same as when the mine closed.

(h) Rating for development purposes based on current performance will be assigned to a new operation in previously undeveloped coal. A new mine will be furnished with a supply of cars sufficient [fol. 35] to enable it to work freely in the course of development for

a period not exceeding 6 months after shipments are begun; provided, that if theretofore its ability to load 150 tons per shift (not, however, to exceed 2 shifts per day) is established, it shall then be rated. A new operation of any other character shall be entitled to a development rating for a period of one month after shipments are begun.

(i) Each mine shall report on a prescribed form to the Chairman Car Allotment Commission, Huntington, W. Va., promptly at the close of each day:

1. The number of hours in the recognized work day;

2. The established time for beginning the day's work;

3. Actual time work was begun this day on tipple;

4. If noon hour intermission is taken, how long;

5. Time lost during the day account:

Waiting for railroad cars or other railroad disability .. — hours;
Strikes or mine labor shortage ..... — hours;
Mine disability ..... — hours;
No market ..... — hours;
All other causes ..... — hours;

6. Time work on tipple ceased for day;

7. Number of hours worked today on the tipple ——— and in the mine, ——————— (See paragraph e);

8. Number of net tons of coal loaded for shipment via Chesapeake & Ohio Railroad;

9. Total number of net tons of coal produced and shipped via each other outlet;

10. Number of coal loaders working today in mine.

Joint mines shall furnish this daily report to each carrier serving them.

If after notice from the railroad an operator persistently fails to furnish this daily report, he will be penalized by curtailment of his car supply to the amount of 25 per cent of distribution for one week.

(j) At the close of each month the mine manager or superintendent in charge of actual operation shall report under oath on a [fol. 36] prescribed form to the Chairman Car Allotment Commission, Huntington, W. Va., having jurisdiction, separately for each mine for each month, as follows:

1. Number of hours in the recognized workday;

2. Total number of net tons of coal produced;

3. Total number of net tons of coal shipped via the Chesapeake & Ohio Railroad;

4. Total number of net tons of coal shipped via each other outlet;

5. Total number of hours worked during the month; (See paragraph e.)

6. Average number of coal loaders working daily in mine during month;

7. Total time lost during month account:

Waiting for railroad cars or other railroad disability ..	— hours;
Strikes or mine labor shortage	— hours;
Mine disability	— hours;
No market	— hours;
All other causes	— hours;
Total, all mine causes	— hours.

This report must be forwarded not later than the 3rd of the month following that for which the statement is furnished; provided, that where the location of the mine makes it inconvenient to furnish a report under oath by that date, a report not under oath may be forwarded and the sworn report forwarded not later than one week after. Joint mines shall furnish this monthly report to each carrier serving them.

(k) If an operator declines or persistently fails to make reports or to make accurate reports to the carrier as required herein, it will be assumed that the mine worked full hours in producing and loading into railroad cars the tonnage shipped and the daily rating will be computed accordingly.

(l) A statement showing the mine ratings which will govern the car distribution for the succeeding month will be furnished as soon [fol. 37] as such ratings are ascertained to such coal mines on this railroad as make application for the same. Such statement will show the mine rating of each mine and the total mine ratings of each coal loading district and the aggregate ratings for all mines and all districts on this railroad, and the percentage of each such figure to the total.

Rules Governing the Distribution of Cars to Coal Mine Tipples (Other Than Anthracite)

Whenever the available car supply in any region (or district) is such that all orders for cars can be filled, cars shall be placed at each mine in accordance with its daily order, except that whenever a mine holds unbilled coal loads, it shall be entitled only to empty cars equal in number to the difference between the rating last established for the mine and the number of unbilled coal loads so held. Whenever the available car supply is such that all orders for cars cannot be filled, each mine shall be given its pro rata share of cars in accordance with the following rules:

1. The daily rating, or the daily order for cars if less than the rating, shall be the basis for car distribution.

2. Grouping of mines, or pooling of cars as between mines, will not be permitted.

3. On application of mine operators and in the discretion of the railroad, cars may be placed on such days only and at such mines only as may elect to work, and overs and shortages in car supply resulting from this distribution shall be adjusted on succeeding days.

4. Each mine operator shall report to the local car distributor at 4 p. m. daily:

(a) Number of unconsigned loads on hand at 7 a. m.

(b) Number of empty and partly loaded cars on hand at 7 a. m.

(c) Additional number of empty cars received during the day.

(d) Aggregate number of empty cars received during the day.

[fol. 38] (e) Number of cars loaded during the day.

(f) Number of empty cars standing over at close of day.

(g) Number of empty cars standing over at close of day which were received prior to 7 a. m., ———— cars; and prior to 10 a. m., ———— cars.

(h) Number of partly loaded cars under tipple at close of day.

(i) Number of unconsigned loads on hand at close of day.

(j) Additional number of empty cars required for loading following day.

Copies of orders for cars for a mine that is joint with any other carrier (steam, electric, or water) shall be filed with a designated representative of each such carrier. Such combinations must not exceed the gross daily rating of the mine.

5. The recognized standard car for coal car distribution is 50 tons. Others are compared thereto by tenths of a car; i. e., 80,000 pounds capacity equals eight-tenths (.8) of a car; 140,000 pounds capacity one and four-tenths (1.4) cars, etc., and cars must be charged and car distribution records maintained accordingly.

6. (a) All cars placed at a mine during each period of 24 hours ending at 10 o'clock a. m. (or when Sundays or holidays intervene, the longer period ending at 10 o'clock a. m. of the day immediately succeeding the Sunday or holiday) shall be charged against the mine on the day when such period ends; provided, that if the cars placed at 7 o'clock a. m. (not including partly loaded cars) do not equal or exceed in number of 25 per cent of the daily rating (or order if less than the rating) then no cars will be charged against the mine that day except such as are loaded on that day.

(b) Cars placed between 10 o'clock a. m and the time the mine ceases work for the day, if loaded or partly loaded on the day placed, will be charged against the mine on that day.

(c) All cars of other than railroad ownership (commonly called [fol. 39] "private cars" placed for owners' loading will be considered as ordered.

7. The pro rata share of cars to which each mine is entitled except as provided in Rule 9, shall be based on its rating (or order when less than its rating). When a mine has empty or partly loaded cars which were placed prior to 7 a. m., or unconsigned loads standing over at the close of the day's business, such cars shall be charged against it each day thereafter while they are detained, except as otherwise provided in Rule 6.

If on any day a mine be furnished with cars totaling less than 100 per cent of its rating (or order if less than its rating) and for any cause whatever other than railroad responsibility fails to load the entire number, the mine shall be considered as having been furnished 100 per cent of its requirements, and its order shall be arbitrarily reduced to the number of cars furnished.

8. Private cars and such cars as are assigned to mines by the Car Service Section, United States Railroad Administration, will be designated as "assigned" cars. All other cars will be designated as "unassigned" cars.

9. If the number of assigned cars placed at a mine during any period, as provided in Rule 6, equals or exceeds the mine's pro rata share of the available car supply, it shall not be entitled to any unassigned cars. The assigned cars, together with the mine's requirements, will be eliminated, and the remainder of the available car supply pro rated to the other mines, based on a revised percentage by reason of such elimination.

10. If the number of assigned cars placed at a mine during any period, as provided in Rule 6, is less than its pro rata share, based on a revised percentage, it shall be entitled to receive unassigned cars in addition thereto to make up its pro rata share.

11. If a mine receives more or less cars than it is entitled to during any period, as provided in Rule 6 (and after eliminating assigned cars as provided in Rule 9), it will be charged with a surplus or credited with a shortage accordingly, and the discrepancy adjusted as promptly as practicable.

[fol. 40] 12. A statement showing the car distribution for the preceding month will be furnished as soon as such distribution is ascertained, to such coal mines on this railroad as make application for the same. Such statement will show the car distribution of each mine, the total car distribution of each coal loading district, the aggregate distribution for all mines and all districts on this railroad, and the percentage of each such figure to the total.

13. Such additional information as may be necessary will be asked for from time to time.

W. L. Booth, Superintendent Transportation.

[fol. 41] APPENDIX B TO BILL OF COMPLAINT

INTERSTATE COMMERCE COMMISSION

No. 12081*

FAIRMONT & CLEVELAND COAL COMPANY

vs.

BALTIMORE & OHIO RAILROAD COMPANY

Submitted May 24, 1921. Decided June 21, 1921.

Defendants' practices in distributing cars to mines of complainants for coal loading found to be unreasonable and unduly prejudicial. Reasonable and nonprejudicial rules prescribed for the future.

James W. Carmalt for complainants and interveners supporting complaints.

Francis R. Cross for Baltimore & Ohio Railroad Company; James Stillwell for Monongahela Railway Company; W. H. T. Loyall for Virginian Railway Company, and W. S. Bronson for Chesapeake & Ohio Railway Company.

P. H. Greenlaw and Thomas L. Phillips for Fifth and Ninth Districts Coal Bureau; George T. Bell, George S. Brackett, and G. H. Caperton for Northern West Virginia Coal Operators' Association and local mine operators in the New River district, and F. H. Harwood for Illinois Coal Traffic Bureau, interveners.

Report of the Commission

Division 5, Commissioners Clark, Aitchison, and Potter

By DIVISION 5:

These cases involve the same issue, were heard together, and will be disposed of in one report.

[fol. 42] Complainants are corporations in West Virginia engaged in the operation of bituminous coal mines. The mine of complainant in Nos. 12081 and 12082, known as the Parker Run mine, is located at Fairmont, W. Va. Complainant owns and maintains about 1.5 miles of siding on its mining property, connected at the

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*This report also embraces No. 12082, Same vs. Monongahela Railway Company; No. 12083, New River Company et al. vs. Virginian Railway Company; and No. 12084, Same vs. Chesapeake & Ohio Railway Company.

west end with the Baltimore & Ohio Railroad and at the east end with the Monongahela Railway. The complainants in Nos. 12083 and 12084 operate 11 mines in the New River district, W. Va., which are served by the Chesapeake & Ohio and Virginian railways, as will hereinafter be more fully explained. The New River Company controls by stock ownership the other complainant corporations in the New River district.

It is alleged in substance that the rules, regulations, and practices governing the distribution of cars for the transportation of coal from the mines of complainants to interstate destinations have been since October, 1918, and still are, unjust, unreasonable, and unduly prejudicial, in violation of Section- 1 and 3 of the Interstate Commerce Act. We are asked to prescribe for the future just and reasonable rules, regulations, and practices with respect to the distribution of coal cars at mines served by two or more carriers, hereinafter termed joint mines.

An intervening petition in support of complainant's contentions was filed at the hearing in Nos. 12083 and 12084 by 14 coal companies operating 23 joint mines in the New River district. These interveners will hereinafter be treated as complainants. Intervening petitions in opposition to complainants' contentions were filed on behalf of the Northern West Virginia Coal Operators' Association in Nos. 12081 and 12082 and on behalf of 14 operators of local mines in the New River district in Nos. 12083 and 12084. The Fifth and Ninth Districts Coal Bureau and the Illinois Coal Traffic Bureau intervened in all four cases, but the latter took a neutral position. No evidence was offered by these interveners except the Northern West Virginia Coal Operators' Association, although the Fifth and Ninth Districts Coal Bureau filed a brief.

[fol. 43] In In re Irregularities in Mine Ratings, 25 I. C. C. 286, hereinafter referred to as the Illinois Case, we laid down the following rule to govern distribution, during the periods of car shortage, of coal cars to joint mines served by the Illinois Central and other carriers:

We think that on days for which it orders no cars from any other carrier, the junction-point mine should be given its pro rata of cars by the Illinois Central on the basis of its full rating; that on a day for which it orders cars from one other road, its rating on the Illinois Central for that day should be 75 per cent of its full rating, and that on a day for which it orders cars from two other roads, its rating on the Illinois Central for that day should be 50 per cent of its full rating.

This rule, however, was not followed by the defendants herein. The Baltimore & Ohio, Chesapeake & Ohio, and Monongahela treated the joint mines the same as local mines in the distribution of cars. They had no information of the number of cars ordered from the other carrier. So far as they were concerned the joint-mine operator could order and secure 100 per cent car supply from each road. The practice of the Virginian was unique. Its car supply practically met the demands of the shippers along its line. It therefore set aside a certain number of cars to take care of its fuel needs and of

mines under development and pro rated the remainder of its equipment in proportion to the shipments via the Virginian for the preceding 12 months. If one shipper, for example, were issued 480 cars in the pool, it was embargoed, after its loading exceeded the number of cars set aside for the mine or mines until the cars were made empty, and was penalized four days to permit the empties to return from the destination to the mines. This practice was followed at both local and joint mines.

Effective October 10, 1918, Car Service Circular CS-31 became effective, and under Rule 2 prescribed the following method for ordering cars for joint mines:

Copies of orders for cars from a mine that is joint with any other carriers (steam, electric or water) shall be filed with the designated [fol. 44] representative of each such carrier. Such combined requests must not exceed the gross daily rating of the mine.

After the signing of the armistice, and until the summer of 1919, there was a lessened demand for coal, and the resultant surplus of coal cars enabled carriers generally to accord all mines a full car supply. The limitations of the rule were not therefore felt until a car shortage developed in the summer of 1919. From that time until approximately December, 1920, the available supply of cars for coal loading throughout the country was insufficient to meet the demands.

At the time Circular CS-31 became effective the Chesapeake & Ohio and Virginian joint mines were zoned, and the car service rules affecting joint mines were not in force. Because of that fact mines zoned to the Virginian had to depend upon the Virginian and mines zoned to the Chesapeake & Ohio had to depend upon the Chesapeake & Ohio, exclusively, for cars.

On March 2, 1920, we issued a notice to carriers and shippers in which we recommended that until experience and careful study demonstrated that other rules would be more effective and beneficial especially during the remainder of the early spring, the uniform rules as contained in the Railroad Administration's Car Service Circular CS-31, Revised, be continued in effect. By further notice to carriers and shippers dated April 15, 1920, our notice of March 2 and our recommendation therein was modified as to Rule 8 of the circular. Rule 2 of Car Service Circular 31 became Rule 4 in the revised circular, but contained no change. The complaints are directed against the last sentence of Rule 4.

On July 8, 1920, the Chesapeake & Ohio and Virginian, on request of complainants, filed with us a petition asking that they be permitted to follow the rule laid down in the Illinois Case. We declined informally to take that action. These complaints followed.

There are two joint mines on the White Oak branch of the Chesapeake & Ohio extending from Glen Jean to Carlisle. This branch was formerly the White Oak Railway. Later the Chesapeake & Ohio [fol. 45] granted to the White Oak Railway trackage rights over this branch to enable it to reach these two mines. In the meantime the White Oak Railway had built a new line from Carlisle to Lochgelly and from Duncan's Crossing, a point intermediate to Lochgelly, to

Bishop, where it connected with the Virginian Railway. There are three mines located on this new line. In 1912 the Chesapeake & Ohio and the Virginian jointly leased the White Oak and the Piney River & Paint Creek Railroad. In 1917 the new line of the White Oak, above referred to, was purchased by the Virginian, and it is now known as its Wolf Creek Branch. In the same year the Chesapeake & Ohio purchased the Piney River & Paint Creek, now known as the Piney River & Paint Creek branch, which connected with the Piney Creek branch of the Chesapeake & Ohio at Beckley Junction. Three and two mines are located on these branches, respectively. The Chesapeake & Ohio also purchased the Price Hill division of the White Oak Railway extending from Price Hill Junction to Price Hill, a distance of about 2.5 miles. This division had no connection with the Wolf Creek branch of the Virginian. Under the terms of a trackage agreement dated November 1, 1917, the Chesapeake & Ohio granted certain trackage rights to the Virginian and the Virginian granted certain trackage rights to the Chesapeake & Ohio over the newly acquired lines, as well as over their own lines, to make the necessary connection with their own operation. This trackage agreement is substantially the same as the trackage agreement in effect between the Chesapeake & Ohio and the Virginian from 1912 to 1917, under which the White Oak and the Piney River & Paint Creek were operated under lease jointly by the Chesapeake & Ohio and the Virginian.

The agreement of sale, and trackage agreement, provided that each carrier should have equal access to and from all mine operations then or thereafter located on the tracks mentioned. For purposes of economy the Chesapeake & Ohio arranged to serve certain of the [fol. 46] mines located on its rails as agent for the Virginian, and the Virginian in turn agreed to place Chesapeake & Ohio cars at mines located on its rails. Each road retained the right to perform the service for itself in case complaint was made of the service performed by the order. Each of the mines is shown as being located on each of these roads and the rates are published as applicable by each. The White Oak and Piney River & Paint Creek railways were constructed and owned by the New River Company. One additional mine covered by the complaint is served jointly by the Chesapeake & Ohio and the Kanawha, Glen Jean & Eastern. This latter line is not a defendant and no further consideration will be given to that mine.

The complainants contend that they have the right to order 100 per cent of their gross daily ratings from each of their connections in times of car shortage and that each road is obligated to serve each of the mines tributary to its rails without discrimination.

It is testified that in acquiring their properties the operators considered it to be essential to successful operation that they have connections with two trunk lines. With this object in view the New River Company built the railways mentioned. The operators of the Parker Run mine commenced operations with the assurance of a car supply from each railroad, one of which was then in contemplation. It is testified that the transportation facilities were a

prime reason for the organization of the company. One of the complainants had the option of putting in a drift operation local to the Virginian or a shaft operation entailing a three-mile extension from the Virginian which would permit of a connection with the Chesapeake & Ohio. It elected to pursue the latter course, and built at its own expense one-half of the extension and the Virginian built the other half in order that service might be obtained from both roads.

The efforts of the local-mine operators were directed mainly to showing that a greater percentage of cars were left over at joint mines than at local mines; that the capacity of the present side- [fol. 47] tracks at joint mines would be insufficient to take care of the equipment if they were permitted to order their gross rating from each carrier; and the alleged advantage which the joint mine has by reason of being able to ship over the road having the greater car supply.

The Baltimore & Ohio contends that the rule in issue is fair and does not operate to the disadvantage of the joint mine, which has the advantage of being able to order cars from the line having the greater car supply. It is interested only to the extent of having rules which will operate equitably as between all shippers of coal situated on its rails, and which will assure the most expeditious handling of equipment.

The interveners operating local mines in the Fairmont and New River districts proceed on the theory that what complainants desire is to order cars on basis of 200 per cent of their maximum capacity to produce. This, however, is not the fact. Complainants' request, while thoretically based on the right to order 100 per cent from each carrier, is subject to restriction to its total mine rating.

The complainants further contend that the operation of the rule referred to amounts to a denial of car service to the complainants and that the rule was issued solely as a war measure. This contention is not supported by the record. On the contrary, it appears that at the time of the adoption of Circular CS-31 no consideration was given to the length of time the rules were to be made operative, although the fact that the roads were being operated as a unit under federal control was a prime reason for the adoption.

The practical operation of the rule complained of is as follows: Mine A is a joint mine served by the Chesapeake & Ohio and Virginian; mine B is local to the Chesapeake & Ohio while mine C is local to the Virginian. Each has a daily rating of 20 cars. On a certain day the Virginian has a 70 per cent car supply, and the Chesapeake & Ohio a 50 per cent car supply. Mine A divides its order between the Chesapeake & Ohio and the Virginian; that is, [fol. 48] it orders 10 cars from each carrier. Local mines B and C each orders 20 cars. As the car supply of the Chesapeake & Ohio is 50 per cent it would furnish mine A with 5 cars while the Virginian, with a 70 per cent car supply, would furnish 7 cars, or a total of 12 cars from both roads. Mine B would receive 10 cars from the Chesapeake & Ohio, and mine C 14 cars from the Virginian.

The joint mines in the New River district, during the month of August, 1920, under the operation of the rule here complained of, received 1,392.6 cars from the Chesapeake & Ohio and 1,881.8 cars from the Virginian, or 167.3 cars more from the Chesapeake & Ohio and 48.2 cars less from the Virginian than they were entitled to. If they had been accorded a similar car supply as local mines with like ratings located on defendants' lines they would have received 2,104.9 cars from the Chesapeake & Ohio and 3,471.1 cars from the Virginian. These joint mines received 183.6 cars less on the Chesapeake & Ohio and 714.6 cars less on the Virginian than they would have been entitled to during the said month under the rule approved by us in the Ilinois case.

During 1920 cars left over at local mines on the Chesapeake & Ohio averaged 8.2 per cent of cars placed, while those left over at joint mines in the New River district averaged 11.4 per cent. The left-overs on the Virginian at joint mines were slightly in excess of the left-overs at local mines, due in part to the physical conditions on what was formerly the White Oak Railway. The Virginian operates over that line only in the daytime, and efforts are made to get sufficient cars to the mines the night preceding for the commencement of operations the following day. If cars are placed too late in the afternoon to be loaded they are reported as being left over. A witness for the Chesapeake & Ohio testified that the question of left-over cars was largely a matter of policing, and that if proper information were given to each railroad regarding the order and supply of cars there would be no occasion for cars being left over at joint mines to a greater extent than at local mines. This witness testified that rule 4 is defective in that it does not require that all lines [fol. 49] serving joint mines be supplied with such information as would make over-ordering impracticable, and thus make full utilization of the empty equipment available from day to day.

The complainants concede that the railroads should exchange such information as will enable them to police left-over cars, and that very few joint mines have trackage facilities greater than their capacity to ship. No difference appears in the record in the latter respect between joint and local mines.

The interveners have filed in evidence a statement of competitive car supply on basis of equivalent number of full days worked by joint mines as against local mines in the New River district by months, for the period from March 1 to December 31, 1920, both dates inclusive. This statement shows that the joint mines worked 157.13 days and the local mines 123.78 days. An aggregate rating of the mines by each carrier is shown, together with the total cars supplied by each. The total cars supplied by both roads are divided by the average aggregate rating of both roads, and the result is shown as the equivalent of the number of full days worked. This statement is subject to the criticism that it takes the aggregate mine ratings rather than the number of cars ordered.

While it is true that the joint mine has an advantage by reason of its location on two railroads because of the additional markets which it can reach, it is likewise true that the joint mine is not always in

a position to avail itself of its alleged advantage because of the practice in the coal business to make contracts for yearly periods beginning with April 1. Neither is it possible at all times for the joint mines to order all their cars from the carrier having the greater car supply, as its contracts may also require shipments to be made by the line having the lesser car supply in order to meet its current obligations. It frequently happens that the joint mine receives a less car supply than the local mine situated on the road having the greater car supply.

In the Illinois Case we said:

Owners of junction-point mines have expended large sums in [fol. 50] order to secure connections with more than one road. The junction-point mine has available a more extensive and more varied market for its coal. It may at times be able to dispose of its product upon the second line of railroad, while the mine local to the first road is unable to market its output. In case of car shortage the junction-point mine is able to select the outlet which affords the best and most liberal means of transportation. These are important advantages to which the junction-point mine is entitled and in the reasonable enjoyment of which it should be protected.

* * * It would be unjustly discriminatory against the junction-point mine not to give reasonable recognition to its natural advantages of location.

We also stated that it was necessary, in order to avoid unjust discrimination in favor of the joint mine as compared with the local mine, to somewhat limit its power to assert its capacity against two or more carriers at the same time.

Following the views expressed in that case, and upon this record, we find that rule 4 of Circular CS-31 Revised, is unreasonable and unduly prejudicial to joint mines and unduly preferential of local mines, to the extent that it limits the aggregate orders of the joint mine to 100 per cent of its rating from both roads; and that for the future during periods of car shortage defendants should distribute cars to the joint mines on their lines here considered on the basis outlined in the Illinois Case, namely, on days when the joint mine orders cars from only one carrier it shall have cars based upon its full rating from that carrier, and on days on which it orders cars from both carriers its rating on each of such carriers shall be 75 per cent of its full rating, subject to the limitation that it shall on no day be supplied with cars in excess of its maximum rating. Information should be exchanged between carriers showing the left-over cars in order to prevent some of the abuses which have heretofore been pointed out.

Under paragraph 13 of section 1 of the interstate commerce act we are authorized by general special orders to require all the carriers [fol. 51] by railroad subject to the act to file with us from time to time their rules and regulations with respect to car service, and we may, in our discretion, direct that such rules and regulations be incorporated in the schedules showing rates, fares, and charges for transportation and be subject to any or all of the provisions of the act relating thereto.

We have not required that car service rules be filed as tariff schedules. We will not in this proceeding direct that the rules which we herein find to be reasonable be so filed. We shall expect, however, that defendants will promptly amend their car service rules so as to conform with our findings and evidence same by filing copies thereof with us.

By the Commission, Division 5.
George B. McGinty, Secretary. (Seal.)

62 I. C. C. (Washington: Government Printing: 1921.)

A true copy. George B. McGinty, Secy.

[fol. 52] APPENDIX C TO BILL OF COMPLAINT

INTERSTATE COMMERCE COMMISSION

No. 12362*

BELL & ZOLLER COAL COMPANY et al.

vs.

BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY et al.

Submitted March 16, 1922. Decided December 11, 1922

Defendants' rules governing the distribution of cars to mines of complainants for coal loading found not unreasonable or unduly prejudicial. Decision in In Re Irregularities in Mine Ratings, 25 I. C. C., 286, distinguished and limited. Fairmont & Cleveland Coal Co. vs. B. & O. R. R. Co., 62 I. C. C., 269, reversed. Complaints dismissed.

Clarence B. Cardy, Cooper, Royse, Bogart & Gambill, Paul N. Bogart, and Samuel D. Royse for complainants in Nos. 12362 and 12399.

James W. Carmalt for complainants in Nos. 12081, 12082, 12083, and 12084.

O. W. Dynes for Chicago, Milwaukee & St. Paul Railway Company; A. P. Humburg for Illinois Central Railroad Company; Robert

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*This report also embraces No. 12399, Vigo Mining Company et al. vs. Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company et al.; No. 12081, Fairmont & Cleveland Coal Company vs. Baltimore & Ohio Railroad Company; No. 12082, Fairmont & Cleveland Coal Company vs. Monongahela Railway Company; No. 12083, New River Company et al. vs. Virginian Railway Company; and No. 12084, New River Company et al. vs. Chesapeake & Ohio Railway Company upon reargument.

[fol. 53] H. Widdicombe for Chicago & North Western Railway Company; Kenneth F. Burgess for Chicago, Burlington & Quincy Railroad Company; L. P. Day for Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company; and W. S. Bronson for Chesapeake & Ohio Railroad Company.

P. H. Greenlaw for Fifth and Ninth Districts Coal Bureau.

Eugene McAuliffe for Union Colliery Company; John M. Sternhagen for Clinton Coal Company, W. S. Bogle Company, and S. B. Mines Company.

Eugene McAuliffe, F. X. Sextro, James Forrester, and George V. Penwell for committee of local mine operators of Illinois; George S. Brackett for Northern West Virginia Coal Operators' Association; G. H. Caperton for committee of local mine operators in New River district of West Virginia; and George T. Bell for interveners.

Report of the Commission

By the COMMISSION:

These cases involve similar issues and will be disposed of in one report.

In Fairmont & Cleveland Coal Co. vs. B. & O. R. R. Co., 62, I. C. C. 269, hereinafter termed the Fairmont cases, we had before us rule 4 of Car Service Circular CS-31 Revised. We found that rule to be unreasonable and unduly prejudicial to joint mines and unduly preferential of local mines, to the extent that it limited the aggregate orders for cars of the joint mine to 100 per cent of its gross daily rating. We also found that for the future, during periods of car shortage, defendants should distribute cars to the joint mines on their lines on the basis outlined in In re Irregularities in Mine Ratings, 25 I. C. C., 286, hereinafter called the Illinois case. In effect, that rule provided that on days when the joint mine orders cars from only one carrier it shall be furnished cars based on its full rating from that carrier, and on days on which it orders cars from both carriers its rating on each of such carriers for the purpose of ordering cars should be 75 per cent of its full rating, subject to the limitation [fol. 54] that on no day shall it be furnished with cars in excess of its maximum rating. No order was entered. Upon petition of intervening local mine operators, we reopened those cases for further argument, and consolidated them with Nos. 12362 and 12399. These cases were submitted together.

The complainants in the Fairmont cases operate joint mines in West Virginia, one of which, located in the Fairmont district, is served jointly by the Baltimore & Ohio and the Monongahela, and the others, located in the New River district, are served jointly by the Chesapeake & Ohio and the Virginian. Complainants in No. 12362 operate 61 joint and 18 local mines in Illinois, while complainants in No. 12399 operate 6 joint mines in Indiana. Some of the mines in the latter two cases are served by more than two carriers.

All the complaints substantially allege that defendants' rules, regulations, and practices governing the distribution of coal cars to

complainants' mines served jointly by two or more railroads have resulted in the distribution during car-shortage periods since October, 1918, of a smaller share of empty coal cars to complainants' mines than is distributed to and received by mines in the same territory which are served by one defendant carrier only; and have been and are unreasonable, unduly preferential of complainants' competitors, and unduly prejudicial to complainants, in violation of sections 1 and 3 of the interstate commerce act. We are asked to prescribe just, reasonable, and nondiscriminatory rules, regulations, and practices to govern the distribution of coal cars to mines served by more than one carrier.

Various operators and committees have intervened in opposition to the complaints in Nos. 12362 and 12399. The Union Colliery Company was the only intervener in whose behalf evidence was offered. Various intervening petitions were filed in Nos. 12081, 12082, 12083, and 12084, as appears in our report in the Fairmont cases, at page 270.

The defendants assume a neutral position and are merely concerned with the establishment of a rule that will be fair and rea- [fol. 55] sonable to all parties concerned, and which will be workable.

Throughout this report the term "local mine" will be used to designate a mine situated on and served by only one railroad. The term "joint mine" will denote a mine served by two or more railroads with their own rails or a mine situated on one railroad, but actually served by one or more additional carriers under trackage agreements or switching-absorption arrangements. Complainants' mines, which are described of record, are embraced within the term "joint mine."

For some years prior to 1912 there was constant controversy between the Illinois Central Railroad and the operators of coal mines located upon its rails relative to the mine ratings, which form the basis of car distribution in times of car shortage, and the rules governing such distribution of cars. The matter was finally submitted to us for determination, upon the record in a proceeding in which no other carrier was a party. In the Illinois case, decided December 3, 1912, we alluded to the rules of the different carriers, discussed the contentions of the conflicting interests, and laid down certain rules to be observed in the rating of mines under the circumstances of that case, and the following rule to govern the distribution of coal cars by the Illinois Central, during periods of car shortage, to mines served jointly by it and other carriers.

We think that on days for which it orders no cars from any other carrier, the junction-point mine (joint mine) should be given its pro rata of cars by the Illinois Central on the basis of its full rating; that on a day for which it orders cars from one other road, its rating on the Illinois Central for that day should be 75 per cent of its full rating; and that on a day for which it orders cars from two other roads, its rating on the Illinois Central for that day should be 50 per cent of its full rating.

These rules were thereafter followed by the Illinois Central. Certain other carriers in that territory, including the Chicago & Eastern [fol. 56] Illinois, hereinafter called the Eastern Illinois, Missouri Pacific, Chicago, Indianapolis & Louisville, and the Chicago, Terre Haute & Southeastern, voluntarily applied the same rule. The method of rating the mines on the Missouri Pacific was somewhat different. The Chicago, Burlington & Quincy, hereinafter referred to as the Burlington, treated all mines on its line on an equality so far as distribution was concerned. Its rules provided for rating the mines on the basis of the tonnage shipped over its road for 10 consecutive days when the mine operated full time and there was a full car supply, plus 20 per cent for development and increase. Every mine, whether local or joint, was entitled to order cars from it based on 100 per cent of its rating as thus determined. The witness produced by this carrier was unable to state in what manner cars were distributed by other carriers to mines served jointly by the Burlington and such other carriers. The methods of car distribution of the other carriers against which the complaints in Nos. 12362 and 12399 are directed are not shown of record, but apparently they were not uniform. Those adopted by the defendants in the Fairmont cases are set forth in our report in those cases.

During the World War agencies were created by the Government to deal with problems of fuel supply. In December, 1917, the principal railroads were taken under Federal control, and thereafter, until March 1, 1920, were operated as a unified and coordinated national system. In April, 1918, the United States Fuel Administration adopted a zoning system, the purpose of which was to minimize haulage, prevent cross hauls, control the distribution of coal to consuming territory, and to increase the supply of cars for coal loading. This system naturally affected and materially changed the distribution of coal so far as markets were concerned. The price of coal was fixed by the fuel administrator.

On October 10, 1918, in Circular CS-31, the United States Railroad Administration promulgated a uniform code of rules governing the rating of coal mines (other than anthracite), loading coal at mine tipples and the distribution of cars to such mines, to supersede all [fol. 57] then existing rules, which were far from uniform. Rule 2 of this circular provided that:

> Copies of orders for cars from a mine that is joint with any other carrier (steam, electric or water) shall be filed with the designated representative of each such carrier. Such combined requisitions must not exceed the gross rating of the mine.

This circular was reissued as Circular CS-31 Revised, effective January 10, 1920. Rule 2 became rule 4 of the revised circular, but contained no change. This rule, which prohibits the operator from ordering cars in excess of the gross daily rating of the mines, was a radical departure from the rule prescribed for the Illinois Central in the Illinois case. It was apparently accepted by the operators as a war measure, and because the roads were being operated as a unit

under Federal control. Until September, 1919, when a car shortage developed, the mines had all the cars and business that they could take care of, and the effects of rule 2 later rule 4, were not fully apparent until that time. From January to November, 1920, the carriers were unable to meet the demand made upon them for empty coal cars.

Federal control of the railroads terminated March 1, 1920. The transportation act, 1920, approved February 28, 1920, brought paragraph (12) into section 1 of the interstate commerce act, in part as follows:

> It shall be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine.

[fol. 58] On March 2, 1920, in a notice to carriers and shippers we recommended that until experience and further study demonstrated that other rules would be more effective and beneficial the uniform rules prescribed in Car Service Circular CS-31 Revised, be continued in effect. This notice was supplemented by a further notice to carriers and shippers dated April 15, 1920, modifying the previous recommendation in certain respects not here material.

In June, 1920, owing to the peculiar conditions existing in Indiana, the carriers in that State began to distribute cars under what is known as the "round robin rule." This contemplated the running of certain mines full time on days when there was a car supply sufficient to give but a part of the mines full running time, and shutting down others, equalizing the time between all the various mines in the current or succeeding months. This practice was agreed to by the operators.

The complainants herein are directed against the last sentence of rule 4 of Circular CS-31 Revised, which limits the joint-mine orders for cars from all the carriers to the gross daily rating of the mine. The whole subject of the ratings of coal mines, other than anthracite, and the distribution of cars between them in times of short car supply, is pending before us in another proceeding. While there may be local variations in method of application, the general basis of ratings may be stated in substance.

The rating of a local mine is determined by taking the total tonnage shipped by the mine during the preceding month over the carrier serving the mine dividing it by the number of hours worked in producing it, and multiplying the quotient by the number of hours in the recognized workday (not more than 10 hours) of the individual mine. A rating so determined is called the daily rating, as distinguished from the gross daily rating which applies to a joint

mine, and which is determined in a similar manner, but by taking the total tonnage shipped over the lines of all the carriers serving the mine.

Complainants contend that a joint mine is entitled to the same pro rata distribution of cars from each carrier as the local mines on each of the carriers serving it. They claim that each carrier is [fol. 59] under a legal obligation to give equal service to all mines located upon its lines. They do not demand the full measure of that which they consider as their due, the legal right to order cars from each carrier based upon the gross daily rating of the mine, but ask that we restore the rule prescribed for the Illinois Central in the Illinois case, with the limitation that in no case should cars be furnished to such joint mine in excess of its gross daily rating.

Certain joint mines in Illinois and Indiana have expended large sums to secure connections with more than one road. This is not true as to all of the joint mines. The evidence seems to establish the fact that it was the desire of the carriers to secure coal traffic, particularly in the southern Illinois coal field, which led to arrangements being made by them for ingress to large mines; either by building into such mines or by means of trackage agreements or switching-absorption arrangements. In instances of this kind it not infrequently happens that the joint mine builds and maintains its own switch tracks and maintains its own locomotives to perform the necessary switching service. The location of the joint mines in the New River and Fairmont districts, and the manner in which service is accorded those mines, are fully set forth in our report in the Fairmont cases, and need not be repeated here.

It is admitted by all that the joint mine enjoys advantages not possessed by the local mine, and has the right to so place its orders as to avoid, if it can, embargoes and congestion of traffic on particular roads. It has available a more extensive and more varied market for its coal. It may at times be able to dispose of its product upon the second line of railroad, while the mine local to the first road is unable to market its output. In case of car shortage the joint mine is able to select the outlet which affords the best and most liberal means of transportation. These are important advantages to which the joint mine is entitled and in the reasonable enjoyment of which it should be protected.

Complainants urge that under rule 4, here attacked, the natural advantages of the joint mine are not recognized in the distribution of cars. They say that the rule does not give the joint mine any [fol. 60] advantages in this respect when, due to the development of its markets and the contracts which it has assumed, it must, of necessity, ship over lines other than the one having the greater car supply. Under the present rules a joint mine can receive as great a number of cars as the local mine located on the line having the greater car supply by confining its orders exclusively to that line. Complainants contend that rule 4 has had the effect, therefore, of limiting their distribution to markets on one railroad only. With this contention we are unable fully to agree. Whenever the joint mine orders cars from the different carriers serving it, it is doubtless

due to other compensating advantages which outweigh those of a temporary greater car supply, and such election is the voluntary choice of the shipper.

The operation of rule 4 is shown by the following example: A joint mine with a gross daily rating of 50 cars located on carriers A and B orders all its cars from carrier A, which has an 80 per cent car supply. The joint mine will receive the same number of cars as a local mine with a daily rating of 50 cars on carrier A. However, if carrier B has a 50 per cent car supply and the joint mine divides its order equally between the two carriers, it will receive 80 per cent of 25 cars, or 20 cars, from carrier A, and 50 per cent of 25 cars, or 12.5 cars, from carrier B, a total of 32.5 cars compared with 40 cars received by the local mine on carrier A. Should the joint mine order more than half its cars from the carrier with the greater car supply this will change the figures somewhat, but in no instance will the joint mine receive as many cars as the local mine served by carrier A if the orders are divided. The complainants concede that the joint mine will, in the aggregate, receive more cars than the local mine located on the carrier with the lesser car supply, and it possibly may receive more cars on the average than the local mines of similar rating on both carriers.

In Ridge Coal Mining Co. vs. M. P. R. R. Co., 62 I. C. C., 259, 262, we said:

* * * the actual or constructive location of the competing mines upon two or more lines of railroad substantially differentiates [fol. 61] their situation from that of the complainant's local mine; and that the preference and advantage over the complainant which such competing mines enjoy by reason of service by two or more lines is not undue.

During September, 1919, the daily ratings of joint and local mines on the Illinois Central (St. Louis division) were 1,845 and 801 cars, respectively. On this basis, under Circular CS-31 Revised, the joint mines would have been entitled to 69.7 per cent of the 23,042 cars delivered by the Illinois Central to all mines on its St. Louis division during that month, or 16,060 cars, if they had confined all their orders to that railroad. By dividing their orders for cars they received 4,068 cars less than they otherwise would have received. Under the rule of the Illinois case the daily rating of these joint mines on the Illinois Central during the same month would have been 1,106 cars, or 57.9 per cent of the total ratings of all mines, provided the orders for cars were divided among all the carriers serving the joint mines. On this basis the joint mines would have been entitled to 13,341 cars, or 1,349 cars more than they actually received. During October, 1919, using the same basis, the joint mines would have received 6,532, or 2,742 cars, respectively, less than they actually did receive, while during August, 1920, the deficiencies would have been 6,968, or 4,272 cars, respectively. Joint mines on the Missouri Pacific and Eastern Illinois would likewise have received substantially fewer cars. While the Burlington's car supply during the periods

covered by the complaint in No. 12,362 was better than that of other roads, complainants for comparative purposes used the Illinois Central figures for the reason that the Burlington did not operate under the rule prescribed in the Illinois case. Complainants in Nos. 12,362 and 12,399 have submitted no statement as to the relative car supply furnished joint mines and local mines during any period.

Interveners have introduced as exhibits statements which compare the car supply at joint and local mines in southern Illinois during certain months. In September, 1919, the local mines in [fol. 62] Franklin, Williamson, Perry, and Gallatin Counties were furnished cars on an average equivalent to 73.3 per cent of their mine ratings, while the joint mines in the same counties during the same month were furnished cars on the average equivalent to 84.6 per cent of their mine ratings. From this interveners argue that since the joint mines already have an advantage, it can not be found that they are prejudiced under the application of rule 4. This conclusion does not follow. The exhibit shows that the Burlington, which during this month had the best car supply, served only 6 of the 30 local mines, but served 23 of the 35 joint mines, and that the joint mines in each case ordered by far the greater portion of their cars from that road. It follows that the joint mines would secure a greater percentage of cars on the average than the local mines, the great majority of which are on the roads with a lesser car supply. If the joint mines had confined their entire order to the road with the best car supply the percentage in favor of the joint mine would have been somewhat increased.

During 1920 cars left over in the New River district at local mines on the Chesapeake & Ohio averaged 8.2 per cent of cars placed, while those left over at joint mines averaged 11.4 per cent of the number placed. On the Virginian the cars left over at joint mines were slightly in excess of those left over at local mines, due in part to the physical and operating conditions on what was formerly the White Oak Railway. A witness for the Chesapeake & Ohio testified that the question of left-over cars was largely a matter of policing, and that if proper information were given to each railroad regarding the order and supply of cars there would be no occasion for cars being left over at joint mines to a greater extent than at local mines. Rule 4, in the opinion of the witness, does not require that all lines serving joint mines be supplied with such information as would make overordering impracticable and thus provide a full utilization of the empty equipment available from day to day.

The evidence indicates that in times of car shortage mine ratings, both local and joint, become inflated an average of 33⅓ per cent. The mine which has the means of more consistently securing as [fol. 63] much as or more than 75 per cent of its daily rating will have more cars left over than another mine which does not possess such means. Therefore to permit of a further inflation of 50 per cent for the purpose of ordering cars would result in a waste of equipment unless some means are devised to prevent overrating of the mines. Witnesses for the joint mines stated that if the carriers would advise the operators each day as to the probable available car

supply no more cars would be ordered than could be loaded in one day. Information of this kind should be conveyed to the operators of both joint and local mines.

Interveners contend that unless an order for cars for the transportation of coal be accompanied by a bona fide tender or setting aside of the coal to be transported, it is not a reasonable request for transportation within the meaning of paragraph (4) of section 1 of the Interstate Commerce Act. For example, if the gross daily rating of a mine is 200 tons, interveners contend that it would be unreasonable to say that the mine, for the purpose of ordering cars, should be in a position of tendering 300 tons to the carriers serving it and to secure its pro rata share of cars on that basis.

Interveners further contend that the first sentence of paragraph (12) of section 1 requires every carrier, during periods of car surplus, to make a just and reasonable distribution of cars among the mines served by it or customarily dependent upon it for car supply, and leaves the question of what is a just and reasonable distribution of cars to the discretion of the carrier or to us upon complaint and after full hearing, while the second sentence of paragraph (12) specifies the particular manner in which the cars are to be distributed during periods of car shortage and leaves nothing regarding the distribution either to the discretion of the carrier or to us. This sentence does not use the term "distribution," but interveners argue that to maintain and apply just and reasonable ratings and to count each and every car furnished to or used by any such mine for transportation of coal against the mine is a mandatory rule of law requiring an exact pro rata distribution of cars in accordance with the prescribed ratings, whether the mine be served by one or more carriers. In view of our conclusions herein, and because the interpretation of paragraph (12) is before us in another proceeding [fol. 64] now pending, we will not pass upon that contention here.

Upon the present record and in the light of instant conditions we are not disposed to extend the principle laid down in the Illinois case, which was intended as a limitation upon the practice of the respondent in that proceeding. Ten years have elapsed since our decision in that case, and we now have a considerable experience with the results of the practice inaugurated by the carriers following our determination, as well as a broader record. We have indicated in proceedings of this character that the principle of stare decisis has no application, and that our determinations as to what will for the future be just and reasonable must meet changed conditions and wider knowledge, as developed by the passage of time. Hillside Coal & Coke Co. vs. P. R. C. Co., 19 I. C. C., 356, 361. Indeed, in passing upon the mine-rating feature of the Illinois case, we indicated in the report at page 295, that we did so only upon the facts and under the conditions there presented, and that our determination in approving the basis presented was not to be understood as indicating approval of its adoption in places where it would not suitably and properly meet the conditions, or where it would be objectionable to the great majority of those affected thereby. In important particulars the present record presents new aspects to us.

There have been important developments in the coal industry, not then in contemplation. The superior advantages of the joint mine over its local competitor, in part flowing from the decision in the Illinois case, have resulted in a proportionately greater development of the industry at points where mines may be served by two or more carriers rather than by but one. A duplication of trackage and of trackage rights has followed in numerous instances. The practice indicated in the Illinois case seems, in certain instances, to result in a waste of car-days which in view of the effects of recent and present car shortages should be avoided. There has been extreme dissatisfaction in the ranks of mine labor, accentuated, in any event, by inequalities in opportunities for working time and wages. The results of such disturbed labor conditions have been harmful to the carriers and to shippers. Whatever tends to inflate the nominal [fol. 65] mine ratings beyond the amount which can normally be produced and shipped is distinctly counter to the public interest. We had before us in the Illinois case other objections, not then considered determinative, but which we may fairly consider as still existent.

The present facts considered, we do not conclude upon these records that the rule attacked, rule 4 of Circular CS-31 Revised, is in principle unreasonable or unduly prejudicial. Our former conclusions in the Fairmont case, based upon a mistaken adherence to and extension of the decision in the Illinois case, are reversed. The present decision is of course without prejudice to such determination of the questions before us in the general proceeding indicated as involving the mine rating and car-distribution rules as the record may there require. The complaints herein will be dismissed, and we will enter an order to that effect.

POTTER, Commissioner, dissenting:

I favor the application of the rule of the Illinois case. To do otherwise is in my judgment to deprive of valuable advantage of location and destroy absolute right under the law. It seems to me the majority report tends to make law rather than apply and enforce it. I think a joint mine has the right to be regarded by each road as though that road were the only road serving it. It loses no right from one when another reaches it. It should receive pro rated equipment from each road based on the traffic which it tenders to that road in proportion to the traffic tendered by other mines. The volume to be considered as its tender to a particular road is its rated output less the tonnage to be shipped by other lines. The rule of the Illinois case in application recognizes a mine's rights and affords method to work them out with substantial justice in a practical manner. If opportunity to ship over more than one road gives a joint mine an advantage in being able to furnish to labor more nearly continuous employment, that advantage belongs to the mine because of the superior transportation service available to it. We may not restrict the use of transportation facilities in order to [fol. 66] equalize mine operation. To do so would be to require discrimination in the use of equipment—not remove it. If a local

mine is at a disadvantage it is not because of a transportation problem with which we may deal but because of a labor supply problem which is not for us. It is by no means certain that the application of the rule of the Illinois case affects labor injuriously or tends to disturb the adjustment.

[fol. 67] Order

At a General Session of the Interstate Commerce Commission Held at Its Office, in Washington, D. C., on the 11th Day of December, A. D. 1922

No. 12362

Bell & Zoller Coal Company et al.

v.

The Baltimore & Ohio Southwestern Railroad Company et al.

No. 12399

Vigo Mining Company et al.

v.

The Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company et al.

No. 12081

Fairmont & Cleveland Coal Company

v.

The Baltimore & Ohio Railroad Company

No. 12082

Fairmont & Cleveland Coal Company

v.

The Monongahela Railway Company

No. 12083

New River Company et al.

v.

The Virginian Railway Company

No. 12084

New River Company et al.

v.

The Chesapeake & Ohio Railway Company

These cases being at issue upon complaints, answers, and intervening petitions on file, and having been duly heard and submitted

by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of facts and conclusions thereon, which said report is hereby referred to and made a part hereof;

It is ordered, That the complaints in these proceedings be, and they are hereby, dismissed.

By the Commission.

George B. McGinty, Secretary. [Seal.]

[fol. 68] District Court of the United States for the Southern District of West Virginia

[Title omitted]

Supplemental Bill

That the complainants, The New River Company, White Oak Fuel Company, Stuart Colliery Company, Dunnloop Coal & Coke Company, Beckley Coal & Coke Company, Mabscott Coal and Coke Company and Cranberry Fuel Company, filed, on or about January 29, 1923, in this Honorable Court their original bill of complaint against The Chesapeake and Ohio Railway Company, The Virginian Railway Company, The United States of America and the Interstate Commerce Commission, for the purpose of securing an adjudication and decree that a decision, order and ruling of the Interstate Commerce Commission of December 11, 1922, and a certain rule put into effect in accordance therewith, known as Rule 4 of Circular CS-31 Revised, were without warrant of law and null and void and that the same be set aside and annulled; also praying for a suspensory order, a temporary injunction and a permanent injunction re-
[fol. 69] straining and enjoining the defendants from restricting, in accordance with said decision, ruling and order and said Rule 4, the transportation service in interstate commerce of the defendant carriers to the complainants, and for other relief, all as set forth in said bill of complaint.

That in article XVI of said bill your complainants alleged that the Interstate Commerce Commission had failed to take any action on a petitioin of the complainants filed with the Interstate Commerce Commission to reopen the proceedings in which said decision was rendered and said rule and order issued, and that said decision, ruling and order and said Rule 4 continued to be in full force and unmodified.

That the complainants hereby further show, by way of supplement:

That on February 5, 1923, since the filing of said original bill, the Interstate Commerce Commission entered an order denying said petition to reopen said proceedings.

The New River Company, White Oak Fuel Company, Stuart Colliery Company, Dunnloop Coal & Coke Company, Beckley Coal & Coke Company, Mabscott Coal & Coke Company, Cranberry Fuel Company, by James W. Carmalt, August G. Gutheim, Addison C. Burnham, Their Attorneys.

[fol. 70] AT A DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

ORDER AND NOTICE OF HEARING—Filed Jan. 29, 1923

Bill of complaint in Equity in the above entitled proceedings having this day been presented to this Court by the complainants by James W. Carmalt, their attorney in said cause, and application for hearing thereon before three judges as provided in 38 Stat. L. 219, having at the same time been made;

And the said Bill of Complaint and application for hearing upon those prayers of the Bill of Complaint, asking for temporary restraining orders and interlocutory injunctions having been duly considered;

It is ordered that said Bill of Complaint be filed in this Court;

It is further ordered that hearing upon said application be set at the Court Rooms of the United States District Court for the District of Virginia, at Richmond, Virginia, at 10 o'clock A. M. Tuesday, February six, 1923;

It is further ordered that copy of this order together with copy of said Bill of Complaint be served upon each defendant in said cause;

And it is further ordered that service of this Order and of said Bill of Complaint upon said defendants, shall constitute the notice of hearing as in said statute provided.

[fol. 71] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

MOTION TO DISMISS ORIGINAL BILL

Comes now the United States of America, one of the defendants in the above entitled cause, by its counsel, and moves the court to dismiss the bill of complaint herein for want of jurisdiction, at complainants' cost, because:

1. The suit is not a suit against the United States to annul and enjoin an order of the Interstate Commerce Commission, pursuant to the Commerce Court Act of June 18, 1910, ch. 309, 36 Stat. 539, and the Urgent Deficiencies Act of October 22, 1913, ch. 32, 38 Stat. 219-221, but is obviously a suit against certain common carriers to enjoin them from putting into force and effect a certain rule adopted by the carriers.

2. The order entered December 11, 1922, by the Interstate Commerce Commission, which complainants seek to have annulled, enjoined and declared void, is a negative order.

3. The bill of complaint seeks to invoke the jurisdiction and authority of the court in a controversy between complainants and the defendant carriers which has heretofore been submitted to, heard and determined by the Interstate Commerce Commission, to the end and in the hope that the court will substitute its jurisdiction for [fol. 72] that of the Commission with respect to a matter committed to the exclusive jurisdiction of the said commission.

4. It appears from the bill of complaint (Par. XVI) that the matters complained of and against which relief is sought are now pending before the Interstate Commerce Commission upon the application for rehearing filed by complainants and others.

5. The matters complained of and concerning which relief is sought have been submitted to and adjudicated by the Interstate Commerce Commission, which is charged by law with the determination of such matters. The order made by the said commission was made in the exercise of judgment and discretion in a matter within its sole jurisdiction and hence cannot be reviewed or controlled by the courts.

Therefore, defendant prays that its motion be sustained.

Elliott Northcott, United States Attorney. H. L. Underwood, Attorney. Blackburn Esterline, Assistant to the Solicitor General.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

MOTION TO DISMISS AMENDED BILL, ETC.

Comes now the United States of America, one of the defendants in the above entitled cause, by its counsel, and, without waiving its motion heretofore filed to dismiss the bill of complaint for want of [fol. 73] jurisdiction, but at all times, now and hereafter, standing and relying thereon, moves the court to dismiss the amended and supplemental bills of complaint herein for want of equity and because the said bills do not state facts sufficient to entitle the complainant to the relief sought therein, or to any part thereof, or to any relief in equity.

Elliott Northcott, United States Attorney. H. L. Underwood, Attorney. Blackburn Esterline, Assistant to the Solicitor General.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

MOTION TO DISMISS ORIGINAL BILL

Now comes the Interstate Commerce Commission, one of the defendants in the above entitled suit, hereinafter called the Commission, and moves the court to dismiss, as to it, the bill of complaint in said suit upon the grounds that:

1. The bill of complaint does not contain statements or allegations of fact which entitle the complainants or any of them to the relief or any of the relief prayed for by complainants in and by said bill of complaint.

2. The Commission's order of December 11, 1922, which is in-
[fol. 74] cluded in Appendix C to the bill of complaint, and wherein and whereby the Commission denied the relief asked for by complainants in certain proceedings before the Commission, mentioned in the bill of complaint, and dismissed their complaints, is a negative order within the meaning of the ruling of the Supreme Court of the United States in Procter & Gamble Company v. United States, 225 U. S. 282, and therefore an order over which this court may not properly exercise jurisdiction.

3. The Commission's report, included in said Appendix C, which is referred to in the bill of complaint as the Commission's "decision and ruling", does not contain any order or requirement, and therefore this court does not possess jurisdiction which enables it to comply with complainant's request to annul and set aside said report.

P. J. Farrell, For Interstate Commerce Commission, Defendant.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

MOTION THAT THE MOTION TO DISMISS THE ORIGINAL BILL BE TAKEN AS APPLYING TO THE BILL AS AMENDED AND SUPPLEMENTED

Now comes the Interstate Commerce Commission, one of the defendants in the above-entitled cause, and moves this court that its motion to dismiss the original bill of complaint herein be taken and considered as a motion to dismiss the bill of complaint herein, as finally amended and supplemented.

J. Carter Fort, For the Interstate Commerce Commission.

[fol. 75] At a District Court of the United States for the Southern District of West Virginia

[Title omitted]

Order Suspending Decision and Ruling of I. C. C., etc.—Filed Feb. 8, 1923

This cause having come on to be heard on the 6th day of February, 1923, on the prayer for a temporary stay or suspension of the operation of the decision, ruling and order of December 11th, 1922, issued by the Interstate Commerce Commission in the cause before said Commission, No. 12083, New River Company, et al. vs. The Virginian Railway Company, and No. 12084, New River Company, et al. vs. The Chesapeake and Ohio Railway Company, and of Rule 4 of Circular C. S.—31 (Revised), as referred to and described in the Bill of Complaint in this cause, and having, after due notice, been heard by three judges, to-wit: Hon. C. A. Woods and Hon. Edmund Waddill, Jr., Circuit Judges, and Hon. Geo. W. McClintic, District Judge, duly convened for said hearing, all parties defendant being represented at said hearing by their attorneys; said cause having been heard and having been argued by all parties, all after due notice, and evidence having at said hearing been submitted that irreparable damage would result to the complainants unless the operation of said decision, ruling and order and of said Rule 4 were stayed and suspended, which said evidence has been transcribed and identified with reference hereto;

[fol. 76] It is found, ordered, adjudged and decreed, two of said judges concurring herein, as follows:

1. It is found that irreparable damage would result to the complainants unless the operation of said decision, ruling and order and of said Rule 4 is suspended and stayed; that the nature of said damage is that unless the operation of said ruling, order and Rule 4 is stayed and suspended the transportation facilities for the shipment of coal produced by the complainants will be so reduced that it will be impossible for the complainants to fulfill their deliveries on existing contract obligations for the delivery of coal; that the complainants' labor organization, gradually built up through a period of time, will be disrupted and disorganized; that complainants will suffer injury to the good will of their business and loss of present and future business; that the complainants' plant and equipment will become in part idle; that the returns on the lessened amount of coal which the complainants will be able to ship will be unable adequately to carry the overhead charges of the complainants' plants and of their business, and that the cost of the coal produced by the complainants will be increased to a large amount per ton.

2. It is ordered, adjudged and decreed, That the operation of said decision, ruling and order of December 11, 1922, of the Interstate Commerce Commission and of Rule 4 of Circular C. S.—31 (Revised)

be stayed and suspended for a period of sixty days from the date of this order, pending the application for an injunction.

This order shall not become effective until the complainants, or some one of them, or some one for them, shall enter into a bond, payable to the United States of America, before the Clerk of this Court, with proper Surety ,to be approved by the Judge thereof, in the penalty of $100,000.00, conditioned according to law.

It is ordered that the evidence of S. A. Scott, taken before the [fol. 77] Court and transcribed by a stenographer, be and the same is here filed as part of the record of this cause.

Enter above order.

Geo. W. McClintic, D. J. Edmund Waddill, Jr., Judge Circuit Court. Richmond, Va., February 8, 1923.

I dissent. See Memorandum to be attached. C. A. Woods, Circuit Judge.

[fol. 78] At a District Court of the United States for the Southern District of West Virginia

[Title omitted]

Order Allowing the Answer of the Virginian Railway Company to be Filed—Filed Feb. 16, 1923

On motion of The Virginian Railway Company, by Counsel, leave is granted it to file its answer in this cause, and the same is accordingly this day filed.

[fol. 79] In the District Court of the United States for the Southern District of West Virginia

[Title omitted]

The Separate Answer of the Virginian Railway Company

This respondent, reserving to itself the benefit of all just exceptions to the Bill of Complaint in this proceeding, for answer thereto, or to so much thereof as it is advised that it is material for it to answer, answers and says:

I. This respondent admits that the objects sought to be accomplished by the Complainants in this case are as set out and alleged in paragraph one of the Complaint.

II. This respondent admits the allegations of paragraphs two, three, four, five, six and seven of the Complaint.

III. This respondent admits the allegations of paragraph eight of the Complaint, in so far as the same correctly recites the language of the several sections of the Interstate Commerce Act which it purports to set out, but no further.

[fol. 80] IV. This respondent admits the allegations of paragraphs nine, ten, eleven, twelve, thirteen and fourteen of the Complaint.

V. This respondent admits the allegations of paragraph fifteen of the Complaint, that it has put into force, and has so notified the Complainants, effective Feb. 1st, 1923, Rule 4 of Circular CS-31, Revised, not because of fear and duress of the penalties that might be imposed by law, but because this respondent considers that said decision of the Interstate Commerce Commission imposed upon it an obligation to put said Rule into effect within a reasonable time after the same was rendered.

VI. The allegations of paragraph sixteen of the Complaint are admitted.

VII. This respondent admits the allegations of paragraph seventeen of the Complaint as to the large capital investment required for the operation and development of the Complainants' shaft mines, and of the large overhead charge connected with their operation.

It neither admits nor denies the allegations as to the various reasons and factors which entered into the locations of Complainants' mines and railroads, and the geographical location thereof in relation to respondent's railway and that of The Chesapeake & Ohio Railway Company.

[fol. 81] It admits the allegations of said paragraph as to the leasing of said White Oak Railway and Piney River and Paint Creek Railroad by The Chesapeake and Ohio Railway Company and by this respondent, and of the subsequent purchase of the same by The Chesapeake and Ohio Railway Company and this respondent, and of the granting of reciprocal trackage rights for a period of ninety-nine (99) years; and it further admits the allegations of said paragraph as to the ownership by The New River Company of the stock of the White Oak Railway Company and of the Piney River and Paint Creek Railroad Company.

This respondent does not admit the allegations of said paragraph as to the motives of Complainants for the sale of said White Oak Railway and the Piney River and Paint Creek Railroad, and respondent avers that the said lease, purchase, and the trackage agreements with The Chesapeake and Ohio Railway Company mentioned were made, so far as this respondent is concerned, solely in order to immediately increase its coal traffic, and as a preferable alternative to the construction of new lines paral-e/ling to some extent the existing lines of The Chesapeake and Ohio Railway. It is admitted that the proposed agreement of purchase and sale, and the Trackage Agreement with The Chesapeake and Ohio Railway Company were submitted to the Interstate Commerce Commission, which made no objection thereto.

This respondent does not admit the allegations of law as to the legal effect of the said agreement entered into between The Chesapeake and Ohio Railway Company and this respondent, as set out in the two concluding sentences of said paragraph seventeen of the Complaint, and does not consider that it is called upon to answer the same.

[fol. 82] VIII. In answer to paragraph eighteen of the Complaint, this respondent states that due to conditions brought about by no fault of its own it has not been able in the recent past to completely fill the orders for coal cars placed with it by the Complainants and other coal operators on its line of railroad.

IX. This respondent neither admits nor denies the allegations of paragraph nineteen of the Complaint, but calls for proof of the same; and in further answer thereto this respondent says that in periods of car shortage, and said Rule 4 of CS-31, Revised, only applies at such times, it is admitted that the Complainants will probably not receive as many cars as their orders will call for.

X. This respondent neither admits nor denies the allegations of law, nor the legal effect of the said decision, ruling and order, of the Interstate Commerce Commission in the Bell & Zoller decision rendered on December 11th, 1922, as set out in paragraphs twenty-one, twenty-two, twenty-three, twenty-four and twenty-five of the Complaint, and submits that it should not be called upon to answer said allegation of law and the legal effect of said decision, nor to answer the arguments of Complainants contained in said paragraphs.

[fol. 83] XI. This respondent neither admits nor denies the allegations of law contained in paragraphs twenty-six and twenty-seven of the Complaint, nor does it consider that it should be called upon to answer the same.

XII. This respondent, having no knowledge of the allegations of paragraphs twenty-eight and twenty-nine of the Complaint, neither admits nor denies the same.

XIII. And for further answer to said Bill of Complaint this respondent says that in the matter of the distribution of its supply of coal cars to the mines of the Complainants, and other coal mines on its lines of railroad, it is subject to the orders, rules, and decisions of the Interstate Commerce Commission; that the Interstate Commerce Commission having, in its said decision in the Bell & Zoller case, decided that said Rule 4 of Circular CS-31, Revised, is not in principle unreasonable or unduly prejudicial, and in the same decision having expressly reversed its conclusions in the Fairmont case and distinguished the Illinois case, this respondent considers that it was legally bound to put into effect on its railroad said Rule 4, of Circular CS-31, Revised, in the distribution of its supply of cars to the coal mines on its line. And this respondent denies that in the distribution of its coal cars it has discriminated against said Complainants, or any other shipper, nor has it in any other manner

[fol. 84] violated the law in connection therewith, but at all times has conducted its business as a common carrier strictly in accordance with law, and the orders, rulings, and decisions of the Interstate Commerce Commission.

And now, having fully answered, this respondent prays that it may be hence dismissed with its costs.

The Virginian Railway Company, By C. H. Hix, Vice-President. Attest: H. Clement, Assistant Secretary. (Seal.)

Affidavit of C. H. Hix to above paper omitted in printing.

[fol. 85] At a District Court of the United States for the Southern District of West Virginia

[Title omitted]

Order Allowing Answer of C. & O. Ry. Co. to be Filed

This day came the Chesapeake & Ohio Ry. Co. by counsel, Fitzpatrick, Brown & Davis, and tendered its separate answer and the same is ordered filed, which is accordingly this the seventeenth day of February done.

[fol. 86] In the District Court of the United States for the Southern District of West Virginia

[Title omitted]

Answer of the Chesapeake and Ohio Railway Company

The Chesapeake and Ohio Railway Company herein answers a bill of complaint filed against it and others in the United States District Court for the Southern District of West Virginia by the New River Company and others, reserving to itself the benefit of all just exceptions to said bill of complaint.

1. For many years prior to Federal control and during Federal control from January 1st to October 10th, 1918, the mine rating and car distribution rules of Respondent, The Chesapeake and Ohio Rail-[fol. 87] way Company, hereinafter termed the "Chesapeake," applicable during car plenty and car shortage periods, made no distinction between so-called joint mines, i. e., mines served by both the "Chesapeake" and The Virginian Railway Company, hereinafter termed the "Virginian," and so-called local mines, i. e., mines served by the "Chesapeake" solely. Under these rules each mine served by it was rated in 50 ton cars by the "Chesapeake" in accordance with its daily capacity to produce and ship coal over the "Chesapeake." A joint mine having the same rated capacity as a local mine

was furnished daily by Respondent the same number of cars furnished a local mine of the same rated capacity the same day. The fact that a joint mine was served by the "Virginian" was given no consideration by your Respondent in the distribution of its cars.

II. Effective October 10, 1918, the United States Railroad Administration, operating as a unit the transportation systems in the United States for the Federal Government, abolished the distinction a common law and under the provisions of the Interstate Commerce Act, which theretofore had existed between joint mines served by independent competing carriers and local mines served by one carrier, by the issuance of Circular C. S.-31, referred to in Article X of the Bill of Complaint. By this circular cars were distributed to joint mines as though furnished by one carrier.

III. For example, prior to October 10, 1918, a mine jointly served by the "Chesapeake" and the "Virginian" and rated by the "Chesapeake" at 50 cars, was privileged to order 50 cars from the Chesapeake without regard to the number of cars ordered from the [fol. 88] "Virginian," and to supply cars without regard to the number of cars supplied by the "Virginian." Thus, on a day when the "Chesapeake" had a 50 per cent. car supply it could under its rules furnish the joint mine 25 cars, precisely the same number it could furnish a local mine served solely by the "Chesapeake" of the same rated capacity, to-wit: 50 cars.

On the same day it is entirely possible for the same mine served also by the "Virginian" to receive 25 cars from the "Virginian." Thus, the joint mine could secure a total of 50 cars, or twice as many from the "Chesapeake" and "Virginian" together as a local mine on the "Chesapeake" or "Virginian" received that day.

Beginning October 10th, 1918, under Rule 2 of Circular C. S. 31, the same 50 car joint mine in ordering from both carriers could not order in excess of 50 cars from the two carriers combined. Thus, a 50 car joint mine ordering 25 cars each from the "Chesapeake" and the "Virginian" on a day when each railroad had a 50 per cent car supply could receive 12-1/2 cars from each carrier, a total of 25 cars from both carriers, the same number of cars that the "Chesapeake" local mine rated at 50 cars could receive from the "Chesapeake" alone.

IV. Effective January 10, 1920, the United States Railroad Administration, Chesapeake and Ohio Railroad, issued Circular C. S. 31 (Revised), superseding Circular C. S. 31, copy of which is filed with Bill of Complaint, Appendix A. By this circular no change was made in the joint mine rule, Rule 2 of Circular C. S. 31 being republished as Rule 4 of Circular C. S. 31 (Revised.)

V. With the resumption of private control, March 1, 1920, on [fol. 89] the recommendation of the Interstate Commerce Commission, hereinafter termed the Commission, dated March 2, 1920, referred to in Article XI of the Bill of Complaint, Respondent made no change at that time in Rule 4 of Circular C. S.-31 (Revised).

VI. Complainants thereupon informally petitioned the Commission to authorize the "Chesapeake" and the "Virginian" to restore the joint mine practice of these carriers in effect prior to Circular C. S.-31. The Commission refused to act on informal complaint, advising petitioners that their remedy was through formal complaint.

VII. Thereupon Complainants filed formal complaint with the Commission against the "Chesapeake" and the "Virginian" severally, alleging that Joint Mine Rule 4 as published in Circular C. S.-31 (Revised) then in effect was unreasonable and unduly preferential and prejudicial. The Commission decided in Fairmont and Cleveland Coal Company against The Baltimore and Ohio Railroad Company, 62 I. C. C. 269, that Rule 4 of Circular C. S.-31 (Revised) was unreasonable and unduly preferential and prejudicial, and found the reasonable, non-preferential and non-prejudicial rule to be the rule prescribed by the Commission in "In re Irregularities in Mine Ratings," 25 I. C. C. 286, commonly known as and hereinafter termed the Illinois rule.

By the Illinois rule, on days when a "Chesapeake" and "Virginian" joint mine ordered cars from both carriers, it could be given cars by each carrier based upon 75 per cent of its rated capacity. [fol. 90] provided, however, that the total cars supplied by both carriers should not exceed the rated capacity of the mine.

For example, the joint mine rated at 50 cars per day could order 37½ cars from the "Chesapeake" and 37½ from the "Virginian," and with a 50 per cent car supply on each railroad could be supplied with 18.75 cars by each carrier, a total of 37.5 cars, whereas the local mine on the "Chesapeake," with a 50 car rated capacity, could receive 25 cars, and a local mine on the "Virginian," with the same rated capacity, could receive 25 cars.

VIII. The Illinois rule was prescribed by the Commission in 1912 as applicable to the Illinois Central Railroad Company, and it is believed the rule had been in force on the Illinois Central and other railroads between that date and October 10th, 1918. As stated in Article I, the "Chesapeake," believing that joint mines were entitled to the same treatment as local mines of similar rating, never published the somewhat restrictive Illinois rule until required to do so by the decision of the Commission in the Fairmont case, supra.

IX. In its decision in the Fairmont case, supra, the Commission issued no formal order requiring your Respondent to publish the Illinois rule, contenting itself in its decision with laying down the Illinois rule as the rule of law applicable to the furnishing of cars to joint mines served by two or more carriers, and while the Com- [fol. 91] plainants contended to your Respondent that the Illinois rule would not operate to give them the full number of cars they were legally entitled to from your Respondent, in a spirit of compromise they accepted the decision.

Among other things, the Commission said in the Fairmont decision, supra:

"Following the views expressed in that case, and upon this record, we find that Rule 4 of Circular CS-31 Revised, is unreasonable and unduly prejudicial to joint mines and unduly preferential to local mines to the extent that it limits the aggregate orders of the joint mine to 100 per cent. of its rating from both roads; and that for the future during periods of car shortage defendant should distribute cars to the joint mines on their lines here considered on the basis outlined in the Illinois case, namely, on days when the joint mine orders cars from only one carrier it shall have cars based upon its full rating from that carrier, and on days on which it orders cars from both carriers its rating on each of such carriers shall be 75 per cent of its full rating, subject to the limitation that it shall on no day be supplied with cars in excess of its maximum rating."

Respondent thereupon published the Illinois rule in its Supplement No. 1 to Circular C. S.-31 (Revised), effective September 17, 1921, copy of which is hereto attached, marked Appendix No. 1. This is the rule automatically continued in force by the restraining order entered by this Court on February 9th, 1923.

X. Prior to its decision in the Fairmont case, supra, formal proceedings had been filed with the Commission, under the style of Bell & Zoller Coal Company, et al. vs. Baltimore & Ohio Southwestern [fol. 92] Railroad Company et al., involving identically the same question involved in the Fairmont case, supra. Some time after Respondent had published the joint mine rule in Supplement No. 1 to Circular C. S.-31 (Revised) in response to the decision of the Commission in the Fairmont case, the Commission reopened the Fairmont case and consolidated it for argument with the Bell & Zoller proceeding.

As the Commission had issued no formal order in the Fairmont case, supra, requiring Respondent to cease and desist publishing the local mine rule as shown in Circular C. S.-31 (Revised) and in lieu thereof to publish the Illinois rule, stating in the decision:

"We have not required that car service rules be filed as tariff schedules. We will not in this proceeding direct that the rules which we herein find to be reasonable be so filed. *We shall expect, however, that defendants will promptly amend their car service rules so as to conform with our findings* and evidence same by filing copies thereof with us." (Italics ours).

there was no formal order of the Commission to be vacated when the Fairmont case, supra, was reopened and consolidated for argument with the Bell & Zoller case, supra. In the belief that the Interstate Commerce Act, as well as the common law, placed an individual legal obligation on Respondent, an initial carrier in direct competition with the "Virginian" at joint mines to furnish their proportional share of transportation to each mine served by Respondent, joint and local, and the Illinois rule, though somewhat limiting this obligation, being acceptable to the joint mines, Respondent con- [fol. 93] tinued in effect the Illinois rule as published in its Supplement No. 1 to Circular C. S.-31 (Revised) after the Fairmont

case was reopened and consolidated for argument with the Bell & Zoller case, supra, and pending the decision in the latter case.

XI. On December 11, 1912, the Commission rendered an opinion in the Bell & Zoller case, supra (77 I. C. C. Rep.), in which it reversed its former decisions in the Fairmont and Illinois cases, supra, and held that joint mine Rule 4 as published in Circular C. S.-31 (Revised) was not unreasonable, or unduly prejudicial or preferential. Orders were issued dismissing the complaints of the New River Company et al. against the "Chesapeake" and "Virginian."

XIII. The orders issued by the Commission in the cases of New River Company et al. vs. the "Chesapeake" and "Virginian," supra, expressly made the report containing findings of fact and conclusions thereon a part thereof, and while negative in form was necessarily treated by Respondent as affirmative in substance and character. The decision in the Bell & Zoller case, supra, which was expressly made part of the order, did two things, first, it condemned the Illinois rule as published by Respondent, and, second, it approved Rule 4 of Circular C. S.-31 (Revised). Because of the reparation provisions of the Interstate Commerce Act, the effect upon Respondent of the order was necessarily precisely the same as though [fol. 94] the order had been in the affirmative form, requiring Respondent to cease and desist publishing and observing the Illinois rule and in lieu thereof to publish and observe Rule 4 of Circular C. S.-31 (Revised).

XIII. Facing as it did the danger of having to successfully defend suits for heavy damages, believed to approximate as much as $5,000.00 per day, supported by a decision and by reparation orders of the Commission, which it is believed would have automatically followed the failure of Respondent to have observed the rule prescribed by the Commission in the Bell & Zoller case, supra. Respondent, after due notice to Complainant, undertook to cancel the joint mine rule published in Supplement No. 1 to Circular C. S.-31 (Revised) through the issuance of Supplement No. 3 to Circular C. S.-31 (Revised), effective February 10, 1923, copy of which is attached, marked "Appendix No. 2," thereby on that date undertaking to restore Rule 4 as published in Circular C. S.-31 (Revised), as shown in Appendix A of 1911 of Complaint.

XIV. Thereupon Complainant brought this proceeding for the purpose of enjoining, preventing and restraining the "Chesapeake" and "Virginian" from applying Rule 4 of Circular C. S.-31 (Revised) and against the United States and Interstate Commerce Commission to enjoin, set aside and annul the decision and order of the Commission of December 11, 1922, as beyond the delegated powers of the Commission and based upon a mistake of law.

[fol. 95] XV. The statutory duties of common carriers engaged in the transportation of passengers and property in the channels of interstate commerce with respect to the furnishing of transportation are prescribed by the Interstate Commerce Act, and by said

Act are in addition to the remedies existing at common law. The question in issue in this proceeding is one of law and not one of administration of the law, and where the Commission, an administrative body, as in this case undertakes to construe the law, the construction of the law by the Commission is reviewable by the United States courts. As shown in this bill and admitted in the answer, under the construction of the law by the Commission Respondent is at times deprived entirely of the right to use its railroad property for transportation purposes, and unless the Commission has properly interpreted the law Respondent is deprived of its property without due process of law and denied the equal protection of the law assured by the Constitution and laws of the United States and the states.

At common law Respondent would be obligated to furnish cars daily to each mine served by it without regard to the number of cars furnished by another carrier serving such mine, and the fundamental question in issue in this proceeding is whether or not under the provisions of the Interstate Commerce Act the duties of a carrier at common law are abridged or altered to the extent of relieving one common carrier of its duty to furnish transportation because another competing carrier happens to have furnished transportation on a particular day during a period of car shortage.

Respondent sumits that it is entitled to the judgment of a court of competent jurisdiction on this question of law and that the fact [fol. 96] that the order in this case happens to be of alleged negative form ought not in equity to be permitted to operate as a denial of the right to submit to the judgment of the Honorable Court the question of law involved in this case.

XVI. Subject to the qualifications, if any, contained in the foregoing articles, Respondent admits the truth of the allegations of fact contained in Articles 2 to 18, inclusive, and 23.

Respondent is without full knowledge of all the facts recited in Articles 19, 20, 28 and 29, and therefore asks for proof, if deemed material to the issue.

As to the allegations contained in Articles 21, 22, 23, 24, 25, 26 and 27, based upon conclusions of law, Respondent respectfully submits to the jurisdiction of the court, and prays for its protection in the premises.

The Chesapeake and Ohio Railway Company, (Signed) By Garrett B. Wall, Vice President. (Seal.) W. S. Bronson, Richmond, Va., Herbert Fitzpatrick, Huntington, W. Va., of Counsel.

[fol. 97] Affidavit of Garrett B. Wall to above paper omitted in printing.

[fol. 98] APPENDIX No. 1 TO ANSWER OF C. & O. RY. CO.

The Chesapeake and Ohio Railway Company

Office of Superintendent Transportation

Supplement 1 to Circular C. S. 31 (Revised), Dated Jan. 6, 1920

Richmond, Va., September 17, 1921.

To all coal operators:

To comply with decisions (Nos. 12081 to 12084 inc.) of the Interstate Commerce Commission (62 I. C. C. 269) rules governing the distribution of cars to coal mine tipples (other than anthracite) are amended as follows:

Rule 1. The daily rating, or the daily order for cars if less than the rating, shall be the basis for car distribution, except as hereinafter provided for joint mines, in Rule 4.

Rule 4. Each mine operator shall report to the car distributor at four p. m. daily:

(a) Number of unconsigned loads on hand at 7 a. m.

(b) Number of empty and partly loaded cars on hand at 7 a. m.

(c) Additional number of empty cars received during the day.

(d) Aggregate number of empty cars received during the day.

(e) Number of cars loaded during the day.

(f) Number of empty cars standing over at close of day.

(g) Number of empty cars standing over at close of day which were received prior to 7 a. m., — cars; and prior to 10 a. m. — cars.

(h) Number of partly loaded cars under tipple at close of day.

(i) Number of unconsigned loads on hand at close of day.

(j) Additional number of empty cars required for loading following day.

Copies of above report and order for cars for a mine that is joint with any other carrier, (steam, electric or water) shall be filed with a designated representative of each such carrier. On days when such joint mine orders cars from only one carrier it shall have cars based upon its full rating from that carrier; on days when such joint mine orders cars from more than one carrier its rating for car distribution purposes that day on each of such carriers shall be that percentage of its gross daily rating which is obtained by dividing one hundred and fifty per cent by the number of such carriers from which it orders cars that day; provided, however, that in no case

shall such mine on any day be supplied with cars from all carriers combined in excess of its gross daily rating.

No changes in rules 2 and 3, or rules 5 to 13 inclusive.

W. L. Booth, Superintendent Transportation.

[fol. 99] APPENDIX No. 2 TO ANSWER OF C. & O. RY. CO.

The Chesapeake and Ohio Railway Company

Office of Superintendent Transportation

Supplement 3 to Circular C. S. 31 (Revised), Dated Jan. 6th, 1920

Richmond, Va., January 23, 1923.

To all coal operators:

Effective February 10, 1923, Supplement 1 (dated September 17th, 1921) to Circular C. S. 31 (Revised) is cancelled, and rules governing the distribution of cars to coal mine tipples (other than anthracite) will be those comprised in Circular C. S. 31 (Revised)—dated January 6th, 1920, and Supplement 2 thereto, dated November 8, 1922.

W. L. Booth, Superintendent Transportation.

[fol. 100] AT A DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

ORDER ALLOWING INTERVENTION OF SLAB FORK COAL CO. ET AL.

The above-entitled cause coming on to be heard, and upon consideration of the application of the Slab Fork Coal Company, Scotia Coal & Coke Company, South Side Company, Turkey Knob Coal Company, Coal Run Coal Company, Branch Coal Company, Beechwood Coal and Coke Company, Greenwood Coal Company, Laurel Creek Coal Company, Quinnimont Coal Company, Maryland-New River Coal Company, Star Coal & Coke Company, Ephriam Creek Coal & Coke Company, Stover Coal Company, for leave to intervene as intervening defendants and to file their intervening petition herein.

It is ordered, that the said application be and it is hereby granted, that the said parties be and they are hereby permitted to intervene as intervening defendants, and that leave be and it is hereby granted to the said parties to file their said intervening petition herein.

[fol. 101] At a District Court of the United States for the Southern District of West Virginia

[Title omitted]

Order for Hearing

This cause coming on this day to be further heard, and it appearing to the Court that a temporary restraining order was entered herein on the 8th day of February, 1923, staying for a period of sixty days from said date, the operation of a certain decision and ruling and order of December 11th, 1922, of the Interstate Commerce Commission; and it appearing further that the hearing for an injunction as asked for in this cause should be had as speedily as possible; and it appearing that under the law in such case made and provided, that it is necessary for the Judge of this Court to call to his assistance two other Judges, and that in order to obtain the presence of two other judges, one of whom must be a Circuit Judge, it is convenient to have such hearing for such injunction at Richmond, in the State of Virginia, upon motion of plaintiffs by counsel;

It is therefore ordered that the application for such injunction is set for hearing at 10 o'clock A. M. on the 24th day of February, 1923, in one of the court rooms in the Federal Building in the City of Richmond, State of Virginia; and that a copy of this order be served upon or accepted by the defendants or their counsel of record, as speedily as possible after this date.

[fol. 102] At a District Court of the United States for the Southern District of West Virginia

[Title omitted]

Order Continuing Hearing

This cause was by order entered herein on the 17th day of February, 1923, set for hearing at Richmond, Virginia, on the 24th day of February, 1923, at the hour of 10 o'clock A. M., and for reasons appearing to the Court on that day, after the appearance of counsel representing all the interests therein, it is ordered that said hearing be continued to one of the court rooms in the Federal Building, in the City of Richmond, State of Virginia, on the 30th day of March, 1923.

[fol. 103] At a District Court of the United States for the Southern District of West Virginia

[Title omitted]

Order Containing Suspension of Decision and Order of I. C. C., Etc.

This cause having come on to be heard on the 30th day of March, 1923, on the complainants' application for a temporary injunction and also on the merits, and it having been moved by the complainants that the temporary stay or suspension of the operation of the decision, ruling and order of December 11, 1922, issued by the Interstate Commerce Commission in the cause before said Commission, No. 12083, The New River Company, et al., vs. The Virginian Railway Company and No. 12084, The New River Company, et al., vs. The Chesapeake and Ohio Railway Company and of Rule 4 of Circular CS-31 Revised, as referred to and described in the Bill of Complaint in this cause and said motion for continuance of said temporary stay or suspension having, after due notice, been held by three judges, to-wit: Hon. C. A. Woods and Hon. Edmund Waddill, Jr., Circuit Judges, and Hon. Geo. W. McClintic, District Judge, duly convened for said hearing, all parties being represented at said hearing by their attorneys and evidence having been submitted that irreparable damage would result to the complainants unless said temporary stay or suspension is so continued, which said evidence has been transcribed and identified with reference hereto:

It is found, ordered, adjudged and decreed, two of said judges concurring herein, as follows:

1. It is found that irreparable damage would result to the com-[fol. 104] plainants unless said temporary stay or suspension is continued, as prayed for; that the nature of said damage is that unless said temporary stay or suspension is so continued the transportation facilities for the shipment of coal produced by the complainants will be so reduced that it will be impossible for the complainants to fulfill their deliveries on existing contract obligations for the delivery of coal; that the complainants' labor organization, gradually built up through a period of time, will be disrupted and disorganized; that complainants will suffer injury to the good will of their business and loss of present and future business; that the complainants' plant and equipment will become, in part, idle; that the returns on the lessened amount of coal which the complainants will be able to ship will be unable adequately to carry the overhead charges of complainants' plant and their business, and that the cost of the coal produced by the complainants will be increased to a large amount per ton.

2. It is ordered, adjudged and decreed, That the temporary stay or suspension heretofore granted be continued until the decision of this court upon the complainants' application for a temporary injunction.

It is ordered that the evidence of S. A. Scott, taken before this court and transcribed, this 30th day of March, 1923, by a stenographer, and also the evidence of said S. A. Scott, taken on the previous hearing on the granting of a temporary stay or suspension and incorporated as a part of his testimony given on this 30th day of March, 1923, be filed as part of the record in this cause.

Enter above order.

Edmund Waddill, Jr., U. S. Circuit Judge. Beo. W. McClintic, District Judge. Richmond, Va., March 30, 1923.

Woods, Circuit Judge, dissents for reasons heretofore expressed by him.

[fol. 105] At a District Court of the United States for the Southern District of West Virginia

[Title omitted]

Order Filing Petition, Motion to Dismiss, etc.

This cause coming on for hearing and the Intervening Defendants Slab Fork Coal Company, et al., appearing and representing by their counsel, George T. Bell, that when this cause was regularly called for hearing on February 6, 1923, the said intervening defendants then and there presented and filed their intervening petition and motion to dismiss; and on February 16, 1923, presented and filed their answer to the bill of complaint herein; and on February 21, 1923, presented and filed two amendments to their said answer making certain corrections in the same; and on March 28, 1923, presented and filed a third amendment to their said answer making certain further corrections and supplements to the same.

It is ordered: That the said intervening petition and motion to dismiss on behalf of Intervening Defendants, Slab Fork Coal Company, et al., be and they are hereby filed as of February 6, 1923, and the said answer of Intervening Defendants be and it is hereby filed as of February 16, 1923, and the first two said amendments to the answer of Intervening Defendants be and they are hereby filed as of February 21, 1923, and the third said amendment to the said answer be and it is hereby filed as of March 28, 1923.

This order having been directed entered on the 30th day of March, 1923, and being inadvertently omitted from the record is entered nunc pro tunc.

[fol. 106] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

INTERVENING PETITION ON BEHALF OF SLAB FORK COAL COMPANY, SCOTIA COAL & COKE COMPANY, SOUTH SIDE COMPANY, TURKEY KNOB COAL COMPANY, COAL RUN COAL COMPANY, BRANCH COAL COMPANY, BEECHWOOD COAL & COKE COMPANY, GREENWOOD COAL COMPANY, LAUREL CREEK COAL COMPANY, QUINNIMONT COAL COMPANY, MARYLAND-NEW RIVER COAL COMPANY, STAR COAL & COKE COMPANY, EPHRIAM CREEK COAL & COKE COMPANY, STOVER COAL COMPANY

To the Honorable the Judges of the District Court of the United States for the Southern District of West Virginia, sitting in equity:

Now come the Slab Fork Coal Company, Scotia Coal & Coke Company, South Side Company, Turkey Knob Coal Company, Coal Run Coal Company, Branch Coal Company, Beechwood Coal & Coke Company, Greenwood Coal Company, Laurel Creek Coal Company, Quinnimont Coal Company, Maryland-New River Coal Company, Star Coal & Coke Company, Ephriam Creek Coal & Coke Company [fol. 107] and Stover Coal Company, hereinafter referred to as Petitioners and by this their Intervening Petition respectfully show:

I. That the said petitioner Slab Fork Coal Company is a corporation under and by virtue of the laws of the State of West Virginia, and operating bituminous coal mines within the said State served by defendant the said Virginian Railway Company in the transportation of goods, including coal and coke, in interstate commerce.

That the said petitioners Slab Fork Coal Company, Scotia Coal & Coke Company, South Side Company, Turkey Knob Coal Company, Coal Run Coal Company, Branch Coal Company, Beechwood Coal & Coke Company, Greenwood Coal Company, Laurel Creek Coal Company, Quinnimont Coal Company, Maryland-New River Coal Company, Star Coal & Coke Company, Ephriam Creek Coal Company and Stover Coal Company are corporations under and by virtue of the laws of the State of West Virginia and operating bituminous coal mines within the said state served by defendant the said Chesapeake & Ohio Railway Company in the transportation of goods, including coal and coke, in interstate commerce.

II. That, insofar as the bill of complaint filed by the complainants in this court in Equity No. 1276 may be regarded as an application to restrain, enjoin and set aside the decision and order of the Interstate Commerce Commission of December 11, 1922 referred to in the said bill of complaint, your petitioners show as grounds for being permitted to intervene in the Equity proceeding No. 1276 aforesaid that they were parties to and interveners in Interstate Commerce Commission Dockets Nos. 12083 and 12084, collectively known as Fairmont & Cleveland Coal Co. v. B. & O. R. R. Co., 62 I. C. C. 269

referred to in the said bill of complaint herein and that they were made parties to and interveners in the said dockets as the result of filing intervening petitions which alleged among other things—

[fol. 108] "2. That the said petitioners are in competition with complainants (the complainants to the bill of complaint herein) both in the production and in the sale of coal, and

"3. That the necessary effect of granting the relief prayed for by complainants during periods of car shortage would be to give their mines more cars than they are entitled to receive, and the mines operated by the said petitioners less cars than they are entitled to receive, under the car service rules, regulations and practices as present in effect."

"4. That, in view of the foregoing facts, the said petitioners are vitally interested in the subject-matter of the complaints filed herein by the complainants, and in the car service rules, regulations and practices applicable at the mine of said complainants as related to the car service rules, regulations and practices applicable at the mines of the said petitioners."

And your petitioners further show that they were also parties to and interveners in Interstate Commerce Commission Docket Nos. 12362 and 12399, collectively known as Bell & Zoller Coal Co. v. B. & O. S. W. R. R. Co., 74 I. C. C. 433, pursuant to all four of which said dockets the Interstate Commerce Commission handed down the decision and order of December 11, 1922 referred to in the said bill of complaint of the complainants herein and appended thereto as appendix C, and which the said complainants are seeking to restrain, enjoin and set aside, and as such parties in interest and interveners in the said dockets and proceedings before the Interstate Commerce Commission have the right to appear before this Honorable Court and be made parties to and intervening defendants in this proceeding in equity under and by virtue of Section 5 of the so-called Commerce Act (36 Stat. L. 539), now part of the so-called [fol. 109] District Court Jurisdiction Act (38 Stat. L. 219) reading as follows:

"Sec. 5. That the Attorney General shall have charge and control of the interests of the Government in all case- and proceedings in the Commerce Court, and in the Supreme Court of the United States upon appeal from the Commerce Court; and if in his opinion the public interest requires it, he may retain and employ in the name of the United States, within the appropriations from time to time made by the Congress for such purposes, such special attorneys and counselors at law as he may think necessary to assist in the discharge of any of the duties incumbent upon him and his subordinate attorneys; and the Attorney General shall stipulate with such special attorneys and counsel the amount of their compensation, which shall not be in excess of the sums appropriated therefor by Congress for such purposes, and shall have supervision of their action; Provided, That the Interstate Commission and any part- of parties in interest to

the proceeding before the Commission, in which an order of requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party; and the Court wherein is pending such suit may make all such rules and orders as to such appearances and representations, the number of counsel, and all matters of procedure, and otherwise, as to subserve the ends of justice and speed the determination of such suits; Provided further, [fol. 110] That communities, associations, corporations, firms, and individuals, who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by anyone under the terms of this Act, or the Acts of which it is amendatory or which are amendatory of it, relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof, and the Attorney General shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervener aforesaid, but said intervener or interveners may prosecute, defend, or continue said suit or proceeding unaffected by the action or nonaction of the Attorney General of the United States therein.

"Complainants before the Interestate Commerce Commission interested in a case shall have the right to appear and be made parties to the case and be represented before the courts by counsel under such regulations as are now permitted in similar circumstances under the rules and practice of equity courts of the United States."

III. That, insofar as the said bill of complaint filed by the complainants herein in equity docket No. 1276 may be regarded as an application to restrain and enjoin the said defendants Chesapeake & Ohio Railway Company and Virginian Railway Company from establishing, observing and enforcing that part of the said Rule 4 of [fol. 111] the said car service Circular CS-31 Revised referred to in the said bill of complaint and reading:

"Copies of orders for cars for a mine that is joint with any other carrier (steam, electric or water) shall be filed with the designated representative of each such carrier, such combinations of orders must not exceed the gross daily rating of the mine."

and which the said defendants, by appropriate notices to the Interstate Commerce Commission and the public, have signified their intention to establish, observe and enforce effective February 10, 1923, as to the said defendant Chesapeake & Ohio Railway Company and effective February 1, 1923 as to the said defendant Virginian Railway Company, your petitioners show as further grounds for being permitted to intervene in the said equity proceeding No. 1276, that they are vitally and directly interested in the establishment, observance and enforcement of the said Rule 4 of the said car service Circular CS-31 Revised referred to in the bill of complaint herein for the reasons stated in paragraph 11 hereof as grounds for their

intervention in the said dockets before the Interstate Commerce Commission as a result of which the Interstate Commerce Commission handed down the decision and entered the order of December 11, 1922, aforesaid; and for the further reason that if the said Rule 4 of the said car service circular CS-31 Revised is not established, observed and enforced, your petitioners will be subjected to an inadequate and unlawful car supply and to unjust and undue prejudice and disadvantage in violation of the Interstate Commerce Act, and to great and irreparable damage, loss and injury.

[fol. 112] IV. That, as further grounds for being permitted to intervene herein, your petitioners are informed and believe and therefore state the fact to be that either or both of the said defendants Chesapeake & Ohio Railway Company and Virginian Railway Company, while professing neutrality, are in a measure and to a certain extent friendly to the position of the said complainants herein as indicated by their said bill of complaint, and that the presence and intervention of your petitioners in this equity proceeding is necessary and desirable for the protection of their direct and vital interest in the establishment, observance and enforcement of the said Rule 4 of the said car service circular CS-31 Revised and to the interest of the public therein.

Wherefore, your petitioners, and each of them, pray that they may be permitted to become parties to this proceeding in equity as intervening defendants, and to be represented by counsel and to take part in all the proceedings had before this Honorable court in the said proceeding in equity and to file any motions or other pleadings which may be permitted to file under the rules of this Honorable court and for such other and further relief as they may be entitled to in equity and as may by this Honorable court be deemed fit and proper.

Slab Fork Coal Company, Scotia Coal & Coke Company, South Side Company, Turkey Knob Coal Company, Coal Run Coal Company, Branch Coal Company, Beechwood Coal & Coke Company, Greenwood Coal Company, Laurel Creek Coal Company, Quinnimont Coal Company, Maryland-New River Coal Company, Star Coal & Coke Company, Ephriam Creek Coal & Coke Company, Stover Coal Company, By George T. Bell, Their Attorney.

[fol. 113] Affidavit of George T. Bell to above paper omitted in printing.

[fol. 114] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

MOTION TO DISMISS ON BEHALF OF SLAB FORK COAL COMPANY, SCOTIA COAL & COKE COMPANY, SOUTH SIDE COMPANY, TURKEY KNOB COAL COMPANY, COAL RUN COAL COMPANY, BRANCH COAL COMPANY, BEECHWOOD COAL AND COKE COMPANY, GREENWOOD COAL COMPANY, LAUREL CREEK COAL COMPANY, QUINNIMONT COAL COMPANY, MARYLAND-NEW RIVER COAL COMPANY, STAR COAL & COKE COMPANY, EPHRIAM CREEK COAL & COKE COMPANY, STOVER COAL COMPANY, INTERVENING DEFENDANTS

To the Honorable the Judges of the District Court of the United States for the Southern District of West Virginia, sitting in equity:

The above named parties, having been permitted to intervene herein as intervening defendants, now respectfully move the court to dismiss the said bill of complaint and for cause of motion show:

[fol. 115] 1. That the said intervening defendants hereby refer to any motion or motions now or hereafter filed in this equity proceeding by defendant the United States of America or defendant the Interstate Commerce Commission to dismiss the said bill of complaint, and hereby adopt the said motion or motions and incorporate its or their allegations and grounds herein as fully as though set out herein, and pray that the court may consider the said motion or motions as the motion of these intervening defendants.

2. That, as further grounds in support of this motion to dismiss, the said intervening defendants show that the matters and things set out in the said bill of complaint are matters and things peculiarly within the jurisdiction of the Interstate Commerce Commission and not within the jurisdiction of the District Court of the United States for the Southern District of West Virginia.

3. That the said bill shows on its face that the said complainants have not exhausted their remedies before the Interstate Commerce Commission and that the matters and things alleged in the bill to result from the establishment and enforcement of the said Rule 4 of the said Circular CS-31 Revised referred to therein are still pending before the Interstate Commerce Commission on a petition to reopen filed by the said complainants herein in Interstate Commerce Commission Dockets from which resulted the said decision and order of December 11, 1922, and that, until the said complainants exhaust their remedies before the Interstate Commerce Commission, the District Court of the United States for the Southern District of West Virginia has no jurisdiction of the matters and things complained of in the said bill.

4. That it does not appear in said bill that the matters complained of are also the subject of a certain preceeding instituted by the Interstate Commerce Commission on its own motion, the said proceeding [fol. 116] being known as Docket No. 13896, In re Rules Governing Ratings of Coal Mines Other Than Anthracite and the Distribution of Cars to Such Mines, and that pending the conclusion of the said proceeding before the Interstate Commerce Commission the District Court of the United States for the Southern District of West Virginia has no jurisdiction of the matters and things complained of in the bill.

5. That the said bill is without equity.

Wherefore, these intervening defendants pray that the said bill of complaint be dismissed.

Slab Fork Coal Company, Scotia Coal & Coke Company, South Side Company, Turkey Knob Coal Company, Coal Run Coal Company, Branch Coal Company, Beechwood Coal & Coke Company, Greenwood Coal Company, Laurel Creek Coal Company, Quinnimont Coal Company, Maryland-New River Coal Company, Star Coal & Coke Company, Ephriam Creek Coal & Coke Company, Stover Coal Company, By George T. Bell, Their Solicitor.

[fol. 117] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

ANSWER, AS AMENDED, OF INTERVENING DEFENDANTS, SLAB FORK COAL COMPANY, SCOTIA COAL & COKE COMPANY, SOUTH SIDE COMPANY, TURKEY KNOB COAL COMPANY, COAL RUN COAL COMPANY, BRANCH COAL COMPANY, BEECHWOOD COAL AND COKE COMPANY, GREENWOOD COAL COMPANY, LAUREL CREEK COAL COMPANY, QUINNIMONT COAL COMPANY, MARYLAND-NEW RIVER COAL COMPANY, STAR COAL & COKE COMPANY, EPHRIAM CREEK COAL & COKE COMPANY, STOVER COAL COMPANY

To the Honorable the Judges of the District Court of the United States for the Southern District of West Virginia, sitting in equity:

Now come the above-named intervening defendants and, not waiving their motion to dismiss heretofore filed in this cause but expressly relying upon and renewing the same, answering say:

[fol. 118] 1. That the said intervening defendants were parties to and interveners in each and all of the four said dockets before the Interstate Commerce Commission referred to in the said bill of complaint of the complainants herein and as a result of which the

Interstate Commerce Commission handed down the decision and entered the order of December 11, 1922 referred to and complained of in the said bill of complaint. That the said decision and order is attached to the bill of complaint herein as appendix C and as such made a part of the said bill and these intervening defendants refer to the said appendix C and by reference make the same a part of this answer as completely as though fully incorporated herein.

2. Intervening defendants admit the allegations in paragraphs I, II, III, IV, V and VI, and show that the mines of said intervening defendants are among the mines, referred to in paragraph VI of the said bill of complaint as—

"other mines in the state of West Virginia producing the same quality of coal and * * * served singly by one or the other of the carriers defendant herein. All of said mines * * * are in active competition in the marketing in other states of smokeless coal produced and mined in West Virginia and transported in interstate commerce," etc.

3. Intervening defendants admit the allegations of paragraphs VII, VIII and the first sentence of paragraph IX but, with reference to the allegations contained in the second sentence of the said paragraph IX, refer to the decision of the Interstate Commerce Commission in Fairmont & Cleveland Coal Co. v. Baltimore & Ohio Railroad Company, 62 I. C. C. 269, a copy of which decision is at-
[fol. 119] tached to the bill as appendix B, for a more correct statement of the rules for the rating of mines and the distribution of cars among the mines applied by the defendant railways prior to the period of Federal control. Intervening defendants admit that the ratings of all mines under the rules now maintained by the said railway defendants represent, for purposes of car distribution, the daily capacities of the mines to produce and ship coal.

4. Intervening defendants admit the allegations of paragraph X of the said bill of complaint.

5. Intervening defendants say, with reference to the matters alleged in the first sentence of paragraph XI of the bill, that the circular dated March 3, 1920 isued and promulgated by the Interstate Commerce Commission shows on its face that it was issued—

"To the end that conflicting and contradictory rules on different roads and in different fields may be avoided in the unusual conditions which now exist in the industries and on the roads, the Commission recommends that until experience and careful study demonstrate that other rules will be more effective and beneficial and especially during the remainder of the early spring and uniform rules as contained in the Railroad Administration's Car Service Section Circular CS-31 (Revised) be continued in effect."

Intervening defendants admit the allegations contained in the second sentence of the said paragraph XI of the bill.

6. Intervening defendants admit that on January 11, 1921 complainants filed complaints with the Interstate Commerce Commis- [fol. 120] sion separately against the two railway defendants herein, as alleged in paragraph XII of the bill. A copy of the complaint against the Chesapeake & Ohio Railway Company is hereto attached as Exhibit A, and intervening defendants show that the complaint against the Virginian Railway Company was identical in allegations with that of the complaint against the said Chesapeake & Ohio Railway Company except that it was directed against the said Virginian Railway Company instead of the said Chesapeake & Ohio Railway Company.

In respect to the other allegations of paragraphs XII and XIII of the bill regarding the decision of the Commission in the proceeding known as Fairmont & Cleveland Coal Co. v. Baltimore & Ohio Railroad Co., 62 I. C. C. 269, intervening defendants refer to the said decision appended to the bill as Appendix B for a more correct statement of what the Commission found in the said proceeding.

7. In respect to the allegations contained in paragraph XIV of the bill down to and through the quotation therein from the decision of the Commission in the proceeding known as Bell & Zoller Coal Co. et al. v. B. & O. S. W. R. R. Co., et al., intervening defendants refer to the said decision which is appended to the bill as Appendix C for a more correct statement of what the Commission found and held in and by the said decision. Intervening defendants show that the following railroads were defendants in the said Dockets Nos. 12362 and 12399 collectively known as Bell & Zoller [fol. 121] Coal Co., et al. v. B. & O. S. W. R. R. Co.:

Baltimore & Ohio Southwestern Railroad,
Chicago, Peoria & St. Louis Railroad,
Cincinnati, Indianapolis & Western Railroad,
Chicago & Eastern Illinois Railroad,
Chicago & Northwestern Railway,
Chicago, Burlington & Quincy Railroad,
Chicago & Alton Railroad,
Chicago, Indianapolis & Louisville Railway,
Chicago, Terre Haute & Southeastern Railway,
Cleveland, Cincinnati, Chicago & St. Louis Railway,
Illinois Central Railroad,
Louisville & Nashville Railroad,
Missouri Pacific Railroad,
Pittsburg, Cincinnati, Chicago & St. Louis Railway,
Southern Railway,

With particular reference to the allegation in the said paragraph XIV that a petition was filed with the Commission to reopen for further consideration the said dockets Nos. 12081-12084, intervening defendants show that they filed the said petition to reopen and that a copy of the said petition is hereto attached and marked Exhibit B.

In respect to that part of paragraph XIV of the bill reading—

"By said decision, order and ruling of the Commission each of the carriers, defendant herein, is authorized and required to limit

its car service to your complainants, and others similarly circumstanced, below the car service which it furnishes to the local mines served by it, as in said Commission's report set out, and said limitation of obligation is arrived at, as to each carrier, by reason of car service and transportation furnished to your complainants, and others similarly circumstanced, by another independent and competing carrier,"

intervening defendants say that the said decision, order and ruling of the Commission dismissed the complaints of the said complain-
[fol. 122] ants herein and did not require the carriers, defendants herein or either of them, to limit car service to the said complainants "below the car service which it furnishes to the local mines served by it" as alleged in the quoted portion of the said paragraph XIV aforesaid. Intervening defendants aver that under the said Rule 4 of Circular CS-31 Revised, the complainants and each of them have the right to tender the entire shipping capacity of any of their joint mines, as represented by the gross daily rating of the mine, to either of the two railway defendants herein and to request transportation on that basis, in which event the joint mine will be entitled to and will receive the same pro rata distribution of cars as a local mine tendering the same shipping capacity to the same carrier on the same day. Intervening defendants further aver that under the said rule any of the joint mines of complainants have the right to split its tender, that is to tender part of its shipping capacity or gross daily rating to one carrier and part to another and to request transportation on that basis, in which event it will be entitled to and will receive the same prorata distribution of cars from each carrier as local mines making similar tenders or similar requests for transportation to those particular carriers on the same day. Intervening defendants further aver that because of the right of the joint mines of complainants or any of them to tender their entire shipping capacity or gross daily rating to either of the said railway defendants herein or to split their tenders of shipping capacity or gross daily rating between the two said railway defendants in any manner complainants may choose, the said joint mines receive or may receive a greater supply of cars than do local mines of the same capacity as found and set out in the said decisions of the Commission appended to the bill as appendices B and C.
[fol. 123] In respect to the allegation of the said paragraph XIV of the bill reading—

"Under said decision, order and ruling if any of your complainants in time of car shortage has availed itself of its right of shipment by the carrier which has the largest available percentage of car supply, to ship so much of its coal as said carrier can take and then desires to ship the remainder of its goods by the other independent and competing carrier, said other carrier is prohibited from giving any transportation service whatsoever to said complainants solely because of the first carrier having taken a portion of the goods which your complainant has desired to ship by it. Thus if one of your

complainants desires to ship all its coal to the Atlantic seaboard by one of the said carriers and orders cars therefor and said carrier, by reason of having only an 80 per cent supply is able to transport only 80 per cent of said coal, the other of said carriers on whose line your complainant is located, and which has a 40 per cent car supply, and by whom your complainant desires to ship the balance of its coal to the Atlantic seaboard, is prohibited from giving any transportation service to your complainant although to other shippers located on its road desiring to ship coal by it, it is giving a 40 per cent service,"

intervening defendants say that when, in the foregoing illustration, one of the complainant joint mines ordered its entire gross daily rating of cars from the said carrier having an 80 per cent supply for shipment "to the Atlantic seaboard" on a given day, the said joint mine tendered and set aside its entire productive and shipping capacity for that day to the said one carrier, and as a result said joint mine had no productive and shipping capacity remaining to make the subject of a tender or request for transportation on that day to the said carrier having a 40 per cent car supply.

Intervening defendants further show that the said circular CS-31 Revised contains a rule requiring each mine to place its orders for cars at or before 4 o'clock of the day before the cars are desired for loading, that is, cars desired for loading on Tuesday must be ordered on Monday. This requirement applies alike to joint mines and local mines, and was not attacked by complainants in their said complaints [fol. 124] before the Commission, and is not attacked by complainants in their said bill of complaint filed herein. When, therefore in the above quoted illustration in the bill of complaint, one of the complainant joint mines on Monday ordered its entire gross daily rating from the carrier having an 80 per cent car supply and thereby tendered its full shipping capacity for shipment "to the Atlantic seaboard" via said carrier on Tuesday, and the said carrier furnished sufficient cars to satisfy 80 per cent of the mines' productive and shipping capacity on Tuesday, it was then too late under the requirement aforesaid for the said mine to place any order for cars with the other carrier for loading on Tuesday and too late for the said other carrier to furnish any cars to the said mine for loading on Tuesday. If, as assumed in the foregoing illustration, the said other carrier is giving a 40 per cent service on Tuesday "to other operators located on its road" it is because said other operators placed their orders for cars, that is made their request for service, on Monday in compliance with the rule aforesaid requiring orders for cars to be presented on the day before the cars are desired for loading.

8. With respect to the allegations of paragraph XV of the bill of complaint, intervening defendants refer to the said decision and order of December 11, 1922 appended to the bill as appendix C for correct information as to what the Commission held and required in and by said decision and order. And intervening defendants further show that the said Circular CS-31 Revised and Rule 4 thereof

were in full force and effect on February 29, 1920 as stated in the closing sentences of paragraph X of the said bill of complaint herein, and that in and by paragraph (a) of Section 208 of the Transportation Act., 1920 (41 Stat. L., 464) all regulations in any wise affecting any part or the aggregate of rates or the value of the service [fol. 125] rendered which were in effect on February 29, 1920 are required to be continued in force and effect until changed by state or Federal authority or pursuant to authority of law, and intervening defendants show that the said Rule 4 of Circular CS-31 Revised affects rates and the value of the service rendered by carriers subject to the Interstate Commerce Act and is therefore required to be continued in force and effect until changed by state or Federal authority or pursuant to authority of law, and intervening defendants are informed and believe and therefore state the fact to be that the Interstate Commerce Commission has given no such authority. In this connection, intervening defendants show that the Baltimore & Ohio Railroad Company and the Monongahela Railway Company, the defendants to Interstate Commerce Commission Dockets Nos. 12081 and 12082, respectively, referred to in Article XII of the bill, restored the said Rule 4 on December 11, 1922 and January 4, 1923, respectively.

9. With respect to the allegations of paragraph XVI of the said bill of complaint intervening defendants show that the decision and order of the Interstate Commerce Commission in the said Dockets Nos. 12081–12084 inclusive, was handed down on December 11, 1922 and was served upon the complainants herein on or before December 15, 1922, and yet none of the complainants herein made any application to the Interstate Commerce Commission to reopen the said dockets until January 11, 1923, as stated in the said paragraph XVI of the bill. Intervening defendants show that under the Rules of Practice of the Interstate Commerce Commission the other parties to the said dockets were entitled to a period of ten days within which to file replies to the said petition to reopen unless otherwise ordered by the Commission. And intervening defendants further show that they were parties to the said dockets and applied for [fol. 126] and were given an extension of time to January 29, 1923 within which to file their reply to the said petition to reopen. And intervening defendants further show that they filed their reply to the said petition to reopen on January 26, 1923 and that certain local-mine operators, interveners in said dockets Nos. 12362 and 12399, collectively known as Bell & Zoller Coal Co. et al. v. Baltimore & Ohio Southwestern Railroad Company et al., petitioned and were permitted to file a reply to the said petition of complainants herein to reopen the proceeding in the said docket Nos. 12083 and 12084, and that the said local-mine operators filed their reply to the said petition on January 27, 1923. Copies of complainants' petition to reopen and of the aforesaid replies thereto are hereto attached and marked Exhibits C, D and E respectively.

Intervening defendants show that the bill of complaint herein was filed on January 29, 1923, or before the Commission had had

an opportunity to consider and pass upon the said petition to reopen and the said replies, and intervening defendants are informed and believe and therefore state the fact to be that the said petition to reopen and replies are now under advisement by the Commission.

10. Intervening defendants are not informed as to the correctness of all the allegations of paragraph XVII of the bill, but they aver that there are over fifty joint mines served by the two railways defendants herein in the New River District of West Virginia wherein is located the joint mines of complainants and that only thirteen of the said more than fifty joint mines are shaft mines and that the remaining joint mines are drift or slope mines similar to the local mines of intervening defendants.

Intervening defendants deny the statement contained in the said paragraph XVII of the bill that the said White Oak Railway and [fol. 127] Piney River and Paint Creek Railroad were built to connect the mines thereon with both the Chesapeake & Ohio Railway and the Virginian Railway, and refer to page 5 of the report of the said White Oak Railway to the Interstate Commerce Commission for the five months ended November 30, 1912, wherein it is stated under oath that the said railway was built by the Stuart Colliery Company, one of the complainants herein, "for the purpose of developing their property and to reach their mines and deliver the coal to the Chesapeake & Ohio Railway," and to page 5 of the report of the Piney River & Paint Creek Railroad for the same period wherein it is stated under oath that the said railroad was built by the Cranberry Fuel Company, another of the complainants herein, "for the purpose of developing their property and to reach their mines and deliver the coal to the Chesapeake & Ohio Railway." And intervening defendants are informed and believe and therefore state the fact to be that when the said White Oak Railway and Piney River & Paint Creek Railroad were built, the said Virginian Railway had not been constructed and extended to the district served by the two short roads aforesaid and that it was not then known what route would be taken by the said Virginian Railway in the construction and extension of its railway line.

With respect to the so-called reciprocal trackage rights, arrangements and agreements referred to in said paragraph XVII of the bill, intervening defendants show that the said reciprocal trackage rights, arrangements and agreements are now the subject of numerous formal complaints pending before the Interstate Commerce Commission, and that among said formal complaints are Docket No. 13832, Gulf Coal Company v. Virginian Railway Company et al. and Docket No. 14454, Wyoming Coal Company et al. v. The Virginian Railway Company et al. and Docket No. 14498, Ragland Coal Company et al. v. The Virginian Railway Company et al. and that in and by the said formal complaints it is alleged, among other things, that the said reciprocal trackage rights, arrangements and agreements subject the complainant companies to undue prejudice and disadvantage and give other companies, including the complainants to the said bill of complaint herein, undue preference and advantage in violation

[fol. 128] of the Interstate Commerce Act. And intervening defendants further show that each and all of the mines of the said complainants herein are located upon the rails of only one carrier and that it is only by the operation of the said so-called reciprocal trackage rights, arrangements and agreements that the said mines are accorded the joint status claimed by the said complainants herein as the basis of their alleged right to order and receive cars from both the said defendant carriers herein.

11. The intervening defendants admit the allegations of paragraph XVIII of the bill of complaint.

12. That, in respect to the allegations of paragraph XIX of the bill, intervening defendants show that the supply of cars furnished to their mines and to other mines similarly circumstanced is also inadequate to transport the coal which the said mines have been developed to produce and are producing and which they have available for shipment and desire to ship.

13. That in respect to the allegations of paragraph XX of the bill, intervening defendants say that they are also desirous of using the particular defendant carrier on which their mines are located to ship in interstate commerce the full amount of coal which the said carrier can receive and transport for intervening defendants, and intervening defendants further show that they and each of them are also prepared to ship and desire to ship by the particular carrier on which their mines are located coal in excess of the amount which the said carrier can furnish cars for on a parity with other mines.

[fol. 129] 14. Intervening defendants deny the allegations of paragraph XXI of the bill that the decision and order of the Interstate Commerce Commission of December 11, 1922 and the said Rule 4 constitute an encroachment upon and a curtailment of the legal right of complainants or any of them to the service of a common carrier in interstate commerce on a parity with other shippers offering similar shipments to said carrier and of the carrier's legal duty and legal and property right as a common carrier to serve the complainants or any of them as said common carrier, or deprive complainants or any of them of their property or legal rights in any respect whatsoever. On the contrary, intervening defendants aver that the said Rule 4 fully recognizes the property and legal rights of complainants and each and all of them and the legal rights and obligations of the railway defendants herein and each of them. The said Rule 4 recognizes the right of complainants to tender the shipping capacities of their mines and to request transportation of either or both of the said railway defendants herein and to request transportation of the coal which can be produced by their joint mines of either or both of the said railway defendants herein, but the said rule in effect requires complainants, as other rules in the said Circular CS-31 Revised in effect require intervening defendants, to accompany their daily orders for cars with bona fide contemporaneous tenders or setting aside of sufficient productive capacities to load and ship the aggregate number of cars ordered. The said Rule 4 recognizes the

common carrier obligations of the said railway defendants herein to furnish cars for loading coal, but intervening defendants aver that the said obligations of the said railway defendants are not called into play unless and until orders for cars and requests for transportation by whomsoever made are accompanied by actual or constructive tenders of sufficient coal to load the aggregate number of cars ordered on the particular day for which the cars are ordered.

[fol. 130] 15. That with respect to the allegations of paragraph XXII of the said bill, intervening defendants for want of complete information deny the statements therein contained to the effect that shippers of other classes of merchandise may properly order cars in excess of their needs as determined by the quantity of goods which they have or can make ready for shipment on the day for which the cars are desired for loading, or that in times of car shortage shippers of other classes of merchandise may properly receive cars based upon orders in excess of their needs as determined by the amount of goods which they have or can make ready for shipment on the day for which the cars are desired for loading. Intervening defendants further show that the complaints filed by the complainants herein with the Interstate Commerce Commission did not present any issue of discrimination as between the complainant shippers of coal on the one hand and shippers of other classes of merchandise on the other. Intervening defendants further show, in respect to the allegations of Article XXII of the bill, that next in importance to the seasonal shortages of coal cars are the seasonal shortages of grain cars and that the railroads of the United States through the American Railroad Association have in effect rules providing that cars for the loading of grain shall be distributed among the shippers in accordance with their orders based upon the quantity of grain on hand and tendered for shipment and that among such rules is the following rule governing the orders of shippers located on more than one railroad:

"Copies of orders by a shipper located on more than one carrier (steam, electric, or water) shall be filed with the agent of each carrier. Such combined orders must not exceed the total grain conveniently located for prompt loading tendered for shipment."

16. In respect to the allegations of paragraph XXIII of the bill [fol. 131] intervening defendants refer to the said decision and order of December 11, 1922 as set out in appendix C of the bill for a more correct statement of what the Commission found and held in and by the said decision and order. In respect to the allegations of the said paragraph of the bill regarding the effect of the said Rule 4, intervening defendants aver that the effect of the application of the said rule is to limit requests of joint mines for transportation to reasonable requests, that is requests which are accompanied by a contemporaneous tender or setting aside of sufficient capacity of the joint mine to load and ship the number of cars named in the request on the particular day for which the said cars are desired for loading. Intervening defendants further aver that other rules in the said Circular CS-31 Revised limit the requests of local mines for transportation to reasonable requests, that is requests which are accompanied by a contemp-

raneous tender or setting aside of sufficient capacity of the mine to load and ship the number of cars named in the request on the particular day for which the cars are ordered. And intervening defendants further aver that the treatment of joint mines and local mines is the same in this respect, and that the said treatment is not discriminatory against the joint mines or any of them.

17. With respect to the statements contained in paragraph XXIV to the effect that, by exchanging information with each other in regard to the number of cars ordered by joint mines and other information, the said carriers are committing acts contrary to the laws of the United States and of the States of Virginia and West Virginia, intervening defendants deny the said allegations and point out that the decision of the Commission as set out in appendix B to the bill of complaint states some of the reasons why it is necessary and desirable for carriers serving joint mines to exchange information. And intervening defendants further show that it is necessary and desirable for [fol. 132] the railroads serving a joint mine to exchange information regarding the orders for cars placed by such mine in order to prevent such mine from placing aggregate orders for cars in excess of its aggregate rating and thereby falsely and fraudulently to represent that it has sufficient coal ready for immediate shipment to load a greater number of cars on a given day than the number represented by its aggregate rating. And intervening defendants refer in this connection to paragraph (4) of Section 10 of the Interstate Commerce Act (25 Stat. L., 855), wherein it is made unlawful for any shipper delivering property for transportation to a common carrier by payment of money or otherwise to induce or attempt to induce any common carrier to unjustly discriminate in his favor as against any other shipper in the transportation of property. Intervening defendants further show that the exchanging of information referred to in the said paragraph XXIV of the bill is a mere police regulation of the carriers serving joint mines, similar in purpose and effect as other police regulations maintained and enforced by carriers such as weighing and inspection bureaus.

18. That with respect to paragraph XXV of the bill intervening defendants deny that the said decision and order of December 11, 1922 dismissing the complaints of the complainants therein, also complainants herein, requires defendant carriers to equalize the labor conditions at joint mines and local mines or in any way makes any requirement which will have the effect of demoralizing labor and production organizations of joint mines or any of them.

19. Intervening defendants further say, with relation to all the matters and things contained in the said bill of complaint, not herein specifically denied or admitted, that they deny the same and deny all allegations and averments in said bill save and except such as are [fol. 133] by this their answer specifically admitted to be true.

20. Intervening defendants further aver that the matters and things complained of in the bill are the subject of a proceeding now pending before the Interstate Commerce Commission known as

Docket No. 13896, in Re Rules Governing Rating of Coal Mines Other Than Anthracite and the Distribution of Cars to Such Mines, instituted by the Commission upon its own motion, wherein the reasonableness and propriety of the rules and regulations contained in Circular CS-31 Revised and each and every rule thereof including said Rule 4 are under consideration. A copy of the order of the Commission instituting the said proceeding known as Docket No. 13896 is attached to the Motion to Dismiss heretofore filed by intervening defendants and is hereby referred to and made a part hereof. The order instituting the said investigation was given wide publicity by the Commission and was referred to at length in the newspapers and coal journals of the country and intervening defendants are informed and believe and therefore state the fact to be that the said complainants herein are parties to and are represented by counsel in the said investigation. And intervening defendants further show that the said investigation is still pending before the Commission.

21. And intervening defendants further show that under the said Circular CS-31 Revised the daily capacity of each mine is determined by taking the total coal tonnage shipped by the mine during the preceding month via the single carrier serving it in the case of a local mine and via the two or more carriers serving it in the case of a joint mine, dividing the said total coal tonnage shipped by the number of hours worked in producing it, and multiplying the quotient by eight which is the number of hours in the recognized work-day in [fol. 134] the said New River District referred to in the bill. The result is termed the daily rating of a local mine and the gross daily rating of a joint mine, and represents in each case the maximum shipping capacity of the mine. On any day when the number of cars available for coal loading is such that all orders for cars filed on the previous day cannot be filled, the rules contained in the said Circular CS-31 Revised including the said Rule 4 provide that the available cars shall be divided and distributed among the mines in accordance with their respective ratings or orders if less than their ratings, and in effect require each and every mine whether local or joint to accompany its order for cars with a contemporaneous tender setting aside sufficient capacity to load and ship the number of cars ordered. And, as the daily rating of a mine represents its maximum shipping capacity, its order is not recognized to the extent that it exceeds its rating. Intervening defendants further show that under the rules contained in the said Circular CS-31 Revised including the said Rule 4, a joint mine may tender its entire rated capacity although determined upon the basis of its shipments during the preceding months via the two or more carriers serving it, to only one of the said carriers on one day and to another of the said carriers on the following day, or it may divide its said tender between the said carriers in any manner it may choose. As a result of the right and privilege aforesaid, joint mines receive or may receive a greater supply of cars on the average than do local mines of the same rated capacity, as found and set out in the said decision of the Commission appended to the bill as appendices B and C. Joint mines are entitled to the greater car supply thus obtained by reason of their advantageous

location on two or more railroads and intervening defendants aver that nothing in the said decision of the Commission or in the said Rule 4 deprives the joint mines of complainants or any of them of the said advantages.

And intervening defendants further aver that under and by virtue of the so-called 150 per cent rule joint mines, when placing orders for cars with two or more carriers on the same day, are partially [fol. 135] relieved of the requirement aforesaid of accompanying their said orders with contemporaneous tenders setting aside sufficient capacity to load and ship the aggregate number of cars ordered. Under the said 150 per cent rule, a joint mine is permitted to make a genuine tender of 75 per cent of its capacity to one carrier and a genuine tender of 25 per cent and a bogus and counterfeit tender of 50 per cent to the second carrier, or a geniune tender of 50 per cent and a bogus and counterfeit tender of 25 per cent to each of the said carriers and to receive a proportional share of the available cars on the basis of the said genuine tenders and a further and additional proportional share of the cars on the basis of the said bogus and counterfeit tenders. And notwithstanding the said privilege accorded to a joint mine under and by virtue of the said 150 per cent rule, a local mine is at all times required to make a genuine tender of sufficient capacity to load and ship all cars ordered on the particular day for which they are ordered, and its car supply is at all times limited to its proportional share of the available cars on the basis of the said genuine tenders. Under the said 150 per cent rule, the carriers give the same consideration to the said bogus and counterfeit tenders of joint mines as to the said genuine tenders of local mines; that is to say, they allot the same number of cars to a joint mine on a bogus and counterfeit tender of capacity to load 50 cars as they contemporaneously allot to a local mine on a genuine tender of capacity to load the same number of cars.

Intervening defendants therefore aver that the said Rule 4 is not unjust, unreasonable or otherwise unlawful and that the Interstate Commerce Commission was fully justified in so finding and that this court should not substitute its judgment for that of the said Commission.

22. Intervening defendants further aver that under the application of the so-called 150 per cent rule aforesaid complainants and [fol. 136] other joint-mine operators receive a greater supply of cars than the just, reasonable and non-discriminatory shares to which they and each of them are entitled under the rule which the Commission, acting within its authority has found and held to be not unjust, unreasonable, or unduly prejudicial, and that to the extent that the said joint-mine operators receive cars in excess of and beyond their just, reasonable and non-discrimnatory shares, intervening defendants and other local-mine operators are deprived of their just, reasonable and non-discriminating shares of the available supply of cars. In times of car shortage, that is during periods when the available supply of cars is insufficient to meet the demands of the coal operators, each and every car given to the complainants and other

joint-mine operators in excess of and beyond their aggregate just, reasonable and proper share of the available pool of cars means a car taken away from the aggregate just, reasonable and proper share of intervening defendants and other local-mine operators.

23. Intervening defendants further aver that they and each of them have invested large sums of money in their coal-mining properties and in developing their said mines to their present rated capacity. They and each of them are so equipped as to capital, productive and selling organizations and other facilities and instrumentalities to produce and market the full amount of coal which could be loaded and shipped in the number of cars represented by their respective just, reasonable and lawful prorata shares of the available cars if joint mines like local mines were compelled to accompany their orders for cars with contemporaneous tenders of capacity to load and ship all cars ordered. But because of the operation of the said 150 per cent rule as described in paragraph 21 hereof intervening defendants and each of them are being deprived of their respective just, reasonable and lawful shares of the cars available for coal loading on the lines of the said railway defendants and as their said mines cannot operate without railway cars under the tipple in- [fol. 137] tervening defendants and each of them are suffering great and irreparable damage in the loss of returns on investment, in wastage and disuse of equipment, in demoralization and loss of labor forces, in lack of employment and demoralization of selling organizations, in loss of profits and contracts by reason of inability to deliver coal thereunder, and in loss of sale of coal and contracts of sale which, except for the deprivation of their just, reasonable and lawful shares of the available cars, intervening defendants are in position to make and desire to make. And intervening defendants further aver that they and each of them will continue to be subjected to such great and irreparable loss, damage and injury if the said Rule is set aside and enjoined and not permitted to become effective.

24. Intervening defendants therefore submit:

First. That the said complainants filed complaints with the Interstate Commerce Commission attacking the said Rule 4 as unjust, unreasonable and unduly prejudicial in violation of Section 1 and 3 of the Interstate Commerce Act, hearings were had and briefs and arguments submitted and upon reargument the Commission found and concluded that the said Rule 4 is not unjust, unreasonable or unduly prejudicial and by appropriate order dismissed the complaints, and that the District Court of the United states for the Southern District of West Virginia has no jurisdiction to set aside or annul this negative order of the Commission.

Second. That the reasonableness and propriety of the said Rule 4 and the matters and things in respect thereof complained of in the bill are within the peculiar jurisdiction and authority of the Interstate Commerce Commission and that as the said Commission, acting within its said jurisdiction and authority, has found and concluded that the said Rule 4 is not unjust, unreasonable and unduly

prejudicial within the terms of Section 1 and 3 of the Interstate Commerce Act, the District Court of the United States for the Southern [fol. 138] District of West Virginia has no jurisdicition to review the said finding and conclusion of the Commission and to substitute its judgment for that of the Commission.

Third. That the said Rule 4 complained of in the bill does not deprive complainants or any of them of any common law, statutory or property right whatsoever and does not relieve the said defendant railways or either of them of any common-carrier obligation to the said complainants or any of them and the said complainants or any of them are not entitled to the equitable relief prayed for and the District Court of the United States for the Southern District of West Virginia has no jurisdiction or authority to grant the relief prayed for or to annul and set aside the said Rule 4 or to restrain and enjoin the said defendant railways herein from enforcing and applying the same.

Fourth. That as the matters and things complained of in the bill are still pending before the Commission both on complainant's petition to reopen the proceedings in the said Dockets 12083 and 12084 and also as a result of the order of investigation entered by the said Commission in said Docket No. 13896, the District Court of the United States for the Southern District of West Virginia has no jurisdiction of the said matters and things complained of in the bill.

Wherefore, intervening defendants and each of them pray that the temporary order entered by this Honorable Court on February 8th, 1923 be set aside, dissolved and cancelled, and that the said bill of complaint be dismissed with costs to the complainants.

Slab Fork Coal Company, Scotia Coal & Coke Company, South Side Company, Turkey Knob Coal Company, Coal Run Coal Company, Branch Coal Company, Beechwood Coal and Coke Company, Greenwood Coal Company, Laurel Creek Coal Company, Quinnimont Coal Company, Maryland-New River Coal Company, Star Coal & Coke Company, Ephriam Creek Coal & Coke Company, Stover Coal Company, By George T. Bell, Their Solicitor.

[fol. 139] Affidavit of G. H. Caperton to above paper omitted in printing.

[fols. 140 & 141] Affidavit to annexed paper omitted in printing.

[fol. 142] EXHIBIT A TO AMENDED ANSWER

Before the Interstate Commerce Commission

Docket No. —

THE NEW RIVER COMPANY, WHITE OAK COAL COMPANY, WHITE OAK FUEL COMPANY, STUART COLLIERY COMPANY, DUNNLOOP COAL & COKE COMPANY, BECKLEY COAL & COKE COMPANY, MABSCOTT COAL & COKE COMPANY, CRANBERRY FUEL COMPANY

v.

THE CHESAPEAKE & OHIO RAILWAY COMPANY

Complaint

The complaint of the above-mentioned Complainants respectfully shows:

1. That Complainant, the New River Company, is a corporation of the State of West Virginia, which controls by stock ownership the other Complainant corporations hereinafter named; that the White Oak Coal Company is a corporation of the State of West Virginia engaged in the sale of the entire output of coal from the mines of the following-named Complainants; that the White Oak Fuel Company, Stuart Colliery Company, Dunnloop Coal & Coke Company, Beckley Coal & Coke Company, Mabscott Coal & Coke Company and Cranberry Fuel Company are corporations of the State of West Vir-[fol. 143] ginia, each of which is operating one or more mines in Fayette and Raleigh Counties, West Virginia, known as the New River District, which said mines are served by said Defendant either directly or by means of trackage, lease, or operating arrangements with other railroads; that the operating offices of said corporations are located at MacDonald, West Virginia. The general offices of all of the Complainants are located at 85 Devonshire Street, Boston, Massachusetts.

II. That the Defendant above named is a common carrier engaged in the transportation of passengers and property wholly by railroad between points in the State of West Virginia, including the mines of said Complainants, and points in various other States, and as such common carrier is subject to the provisions of the Act to regulate Commerce approved February 4, 1887, and acts amendatory thereto and supplementary thereof, including the act known as the Transportation Act, 1920, approved February 28, 1920:

III. That this complaint refers only to the rules, regulations and practices of Defendant as affecting mines of said operating companies which are served jointly by the Defendant and by some other carrier or carriers and are known as indicated in the following table:

[fol. 144] Name of operating company	Name of mine
White Oak Fuel Company	Scarboro.
	Whipple.
	Oakwood.
Stuart Colliery Company	Summerlee.
	Lohgelly.
Dunnloop Coal & Coke Company	Dunnloop.
Beckley Coal & Coke Company	Beckley.
Mabscott Coal & Coke Company	Mabscott.
Cranberry Fuel Company	Cranberry No. 1.
	Cranberry No. 2.
	Cranberry No. 3.

IV. That all of said mines mentioned in paragraph III carry a heavy overhead charge, and the overhead expense of such mine developments can be successfully carried only if the mines can be continuously operated; that the investment of The New River Company in its mine operations is very large and the investment moneys therefor could have been, and were, secured only upon the assumption that these mines were so geographically located that they could have connection with, and service from, more than one trunk line connection, there being at that time no rule of law which prohibited the mine from receiving a full car supply from each of its said connections.

V. That since the beginning of the operation of the mines of the Complainants mentioned in paragraph III hereof they, and each of them, have been served jointly by this Defendant and by the Chesapeake & Ohio Railway Company and are therefore hereinafter called joint mines; and that each of said joint mines has continuously re-
[fol. 145] ceived car service from each of the said connections and is still being served by each of them.

VI. That on or about January 1, 1918, the said Defendant and the Chesapeake & Ohio Railway Company were taken over and operated by the Government, said operation by the Government continuing until March 1, 1920, since which time each of said carriers has been operated by its own officers.

VII. That during the months following the taking over of the properties by the Government each of the common carriers named furnished car service at each of said mines upon the same basis as had been afforded by them prior to Federal control.

VIII. That on, to-wit, September 1, 1918, as a war measure to meet the war emergency, the United States Railroad Administration, acting in conjunction with the United States Fuel Administration, and acting through its Car Service Section, issued its circular known as C. S-31, which provided, among other things, in rule 4 of "Rules Governing the Distribution of Cars to Coal Mines," the following:

"Copies of orders for cars for a mine that is joint with any other carrier (steam, electric or water) shall be filed with the designated

representative of each such carrier. Such combinations must not exceed the gross daily rating of the mine."

[fol. 146] IX. That the rule quoted in the last preceding paragraph was issued as a war measure to meet the war emergency at the time of its publication and was issued at the time when the markets for coal were zoned by the United States Fuel Administration; that said rule was promulgated, therefore, at a time when competitive conditions had been eliminated, as a war measure, both from the transportation situation and from the marketing of coal.

X. That, notwithstanding the promulgation of said rule limiting the supply of cars at joint mines, the rule was not strictly enforced until during October, 1919; and that thereafter the said rule has been rigidly enforced to the prejudice of the operators of joint mines, particularly to the prejudice of complainants' joint mine operations.

XI. That at the expiration of said Federal control, and upon the assumption of the operation of its railroad by its owners, the said Defendant herein, as well as the Chesapeake & Ohio Railway Company, was called upon to cancel the rule quoted in paragraph VIII hereof and it has refused to do so, basing its refusal upon certain ex parte rulings of the Commission issued under date of March 2 and April 15, 1920, respectively, bearing upon the rules of car distribution at bituminous coal mines, hereto appended, marked respectively Exhibit A and Exhibit B.

XII. That under the operation of said rule for the distribution of [fol. 147] Defendant's available coal car equipment, it has resulted and continues to result that a smaller pro rata share of Defendant's available empty cars is distributed to each of the mines mentioned in paragraph III hereof than is distributed to, and is received by, mines served by the Defendant's line in the same territory that are local to its rails and not served by any other carrier.

XIII. That said rule quoted in paragraph VIII hereof has in its operation the effect of denying to these Complainants the natural advantage to which their geographic location entitles them; and that said rule is an attempt to limit, without authority of law, the obligations of the Defendant as a common carrier, in so far as it attempts to excuse its failure to furnish a full pro rata share of available equipment on the ground that certain other carrier or carriers are furnishing equipment to the Complainants and other operators of joint mines.

XIV. That by reason of the facts stated in the foregoing paragraphs, Complainants are subjected to rules, regulations and practices for transportation and car service which were, when issued, and still are, unjust and unreasonable in violation of section 1 of the Act to Regulate Commerce as amended, particularly paragraphs 11 and 12 of said section 1, and unduly preferential of Complainant's competitors and prejudicial of Complainants in violation of section 3 of said Act:

Wherefore, Complainants pray that Defendant may be required to answer the charges herein; that, after due hearing and investiga-
[fol. 148] tion, an order be made commanding said Defendant to cease and desist from the aforesaid violations of said Act to regulate commerce, and said Acts amendatory thereto, and of said Transportation Act, 1920; and to establish and put in force and apply in future to the transportation of coal in interstate commerce between said joint mines in West Virginia and destination points in other States, and to the car service in connection therewith, in lieu of the rules, regulations and practices at present in operation and effect with respect to distribution of empty coal cars at joint mines, such other rules, regulations and practices as the Commission may deem reasonable and just and non-discriminatory, and that such further order or orders be made as the Commission may consider proper in the premises.

The New River Company, White Oak Coal Company, White Oak Fuel Company, Stuart Colliery Company, Dunnloop Coal & Coke Company, Beckley Coal & Coke Company, Mabscott Coal & Coke Company, Cranberry Fuel Company, By Carmalt, Hagerty & Wheeler, Attorneys. James W. Carmalt, Of Counsel. December 20, 1920.

[fol. 149] EXHIBIT "A" TO COMPLAINT

INTERSTATE COMMERCE COMMISSION, WASHINGTON

Notice to Carriers and Shippers

March 2, 1920.

The supply of cars available for the transportation of coal is insufficient to meet the demand. Unusual movements incident upon the strike of coal miners has brought about an abnormal location of cars. It is desirable that the proper relocation of cars shall be brought about as rapidly and with as little confusion as is possible. Critical situations still exist in which fuel for essential industries and purposes must be provided. The railroads and the coal operators have all been working under the uniform mine rating and car distribution rules established by the Railroad Administration and those rules seem to be generally satisfactory and to meet with general approval.

To the end that conflicting and contradictory rules on different roads and in different fields may be avoided in the unusual conditions which now exist in the industries and on the roads, the Commission recommends that until experience and careful study demonstrate that other rules will be more effective and beneficial and especially during the remainder of the early spring the uniform rules as contained in the Railroad Administration's Car Service Section Circular CS-31 (Revised) be continued in effect.

George B. McGinty, Secretary.

[fol. 150] EXHIBIT "B" TO COMPLAINT

INTERSTATE COMMERCE COMMISSION, WASHINGTON

Notice to Carriers and Shippers

April 15, 1920.

The supply of cars available for the transportation of coal con tinues insufficient to meet the demand. In view of the cessation Government control of coal production and distribution, effecti April 1, 1920, and in order that railroad fuel requirements may b reasonably met without the necessity of carriers resorting to con fiscation of commercial coal, it becomes necessary to amend ou notice to carriers and shippers dated March 2, 1920, and our recom mendation therein to read as follows:

The Commission recommends that until experience and carefu study demonstrate that other rules will be more effective and ben ficial, the uniform rules as contained in the Railroad Administra tion's Car Service Circular CS 31 (Revised) be continued in effec except that rule 8 as contained in said circular should be amende to read:

8. Private cars and cars placed for railroad fuel loading in accord ance with the decisions of the Interstate Commerce Commission i R. R. Com. of Ohio et al., v. H. V. Ry. Co., 12 I. C. C., 398, and Trac v. Chicago & Alton Railroad Co. et al., 13 I. C. C., 451, will be desig nated as "assigned" cars. All other cars will be designated as "un assigned" cars.

The Commission is of opinion that an emergency exists requirin immediate action, and in exercise of the authority conferred b paragraph (15) of Section 1 of the interstate commerce act, a amended by Section 402 of the transportation act, 1920, hereby sus [fol. 151] pends the operation of the existing rule 8 and directs th observance by all carriers by railroad subject to the interstate com merce act of rule 8 modified as above, effective April 16, 1920, an until the further direction or order of the Commission:

By the Commission:

George B. McGinty, Secretary

[fols. 152 & 153] Affidavit to annexed paper omitted in printing

[fol. 154] EXHIBIT B TO AMENDED ANSWER

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 12081

FAIRMONT & CLEVELAND COAL COMPANY

v.

THE BALTIMORE & OHIO RAILROAD COMPANY

Docket No. 12082

FAIRMONT & CLEVELAND COAL COMPANY

v.

MONONGAHELA RAILWAY COMPANY

Docket No. 12083

THE NEW RIVER COMPANY et al.

v.

THE VIRGINIAN RAILWAY COMPANY

Docket No. 12084

THE NEW RIVER COMPANY et al.

v.

THE CHESAPEAKE & OHIO RAILWAY COMPANY

Petition for Reconsideration, Reargument, and Consolidation with Docket No. 12362, Bell & Zoller Coal Company et al. v. Baltimore & Ohio Southwestern Railroad Company et al.

Now come the following named interveners in the above entitled proceedings, to-wit: Slab Fork Coal Company, Scotia Coal & Coke Company, South Side Company, Turkey Knob Coal Company, Coal [fol. 155] Run Coal Company, Branch Coal Company, Beechwood Coal & Coke Company, Greenwood Coal Company, Laurel Creek Coal Company, Quinnimont Coal Company, Maryland Coal & Coke Company, Star Coal & Coke Company, Ephriam Creek Coal & Coke Company, Stover Coal Company, Northern West Virginia Coal Operators' Association, and Fifth & Ninth Districts Coal Bureau, and by this, their petition for reargument, reconsideration, and consolidation of these cases with Docket No. 12362, Bell & Zoller Coal Company et al. v. Baltimore & Ohio Southwestern Railroad Company et al., now pending for hearing, respectfully show:

1. That, while these proceedings were instituted by the filing of four separate complaints by operators of joint mines against the rail-

roads serving their mines, it developed at the hearing that the defendants in two of the cases were ready and willing to grant the relief prayed for, while the defendants in the two remaining cases assumed what amounted to a neutral position. The rule of car distribution attacked in all the cases was really defended by operators of local mines, your petitioners herein, with the result that the consolidated proceeding resolved itself into one between the operators of joint mines on the one hand and the operators of local mines on the other. In view of these facts your petitioners represent that the Commission should give the same consideration to this petition as it would give to a similar petition by the defendant railroads.

2. That the Examiner who presided at the hearing herein made no report of proposed findings of fact and conclusions, as is the [fol. 156] general practice in proceedings of this importance, and consequently your petitioners have not been afforded the same full and complete opportunity to submit their case to the Commission as has been and is customarily afforded to the parties in other proceedings.

3. That in the decision herein (Fairmont & Cleveland Coal Co. v. Baltimore & Ohio R. R. Co., 62 I. C. C. 269) the Commission gave no consideration whatsoever to the most important contentions urged by the intervening local-mine operators, although due consideration was given to two minor contentions urged by them and to all the contentions made by the complaining joint-mine operators. On page 273 of the report it is stated:

"The efforts of the local-mine operators were directed mainly to showing that a greater percentage of cars were left over at joint mines than at local mines; that the capacity of the present sidetracks at joint mines would be insufficient to take care of the equipment if they were permitted to order their gross rating from each carrier; and the alleged advantage which the joint mine has by reason of being able to ship over the road having the greater car supply."

The above statement that the efforts of the local-mine operators were directed mainly to the three matters referred to is in error. The local-mine operators made no contention regarding the capacity of sidetracks, and the matter is not even mentioned in their brief (see note). The report of the Commission shows that due consideration [fol. 157] was nevertheless given to it and the other matters referred to in the above quotation, as they are analyzed in detail on pages 274 and 275 of the report. But nowhere in the report is even the slightest mention made of the major contentions of the intervening local-mine operators.

NOTE.—The writer of the report evidently accepted the statement of the contentions of the local-mine operators contained in the initial brief (page 24) of the joint-mine operators. At the hearing Counsel for the local-mine operators asked a few questions regarding the capacity of joint-mine sidings, but made no contention based thereon.

(a) Your petitioners show that in the report herein the Commission does not so much as refer to their contention that—

Any request by a coal mine operator for more cars than the mine can load and have ready for shipment on a given day is not a reasonable request within the meaning of paragraph 4 of section 1 of the act.

This contention appears on pages 15-16 of the brief for the West Virginia local-mine operators. It was also referred to at length at the oral argument before the Commission, in the course of which the following colloquy took place between Mr. Commissioner Potter and counsel for the complaining joint-mine operators:

"Commissioner Potter: Mr. Carmalt, suppose a mine has a capacity of 20 cars a day, and suppose it orders or receives five cars from Line A. Is not the capacity of that mine thereby reduced to 15 cars?

Mr. Carmalt: Absolutely, yes, sir.

Commissioner Potter: And should not Line B then prorate on basis of a 15-car capacity, and not a 20-car capacity?

Mr. Carmalt: Not a 15-car capacity; but, allow it its right to assert its full rating, provided it does not get, in the aggregate, more than 20 cars from the two roads. That is my contention.

[fol. 158] Commissioner Potter: Is not the spirit or intent that the shippers shall prorate their shipments according to the amount they have to ship over the two lines.

Mr. Carmalt: Yes, sir; I think so. (Record, 398-399.)

* * * * * * *

Commissioner Potter: Mr. Carmalt, suppose a mine has an actual capacity to produce 20 carloads of coal per day. Suppose it sells five carloads per day to a power plant located at the mine mouth; so that it actually has power to ship commercially only 15 cars per day. Now, what should be the rating of that mine?

Mr. Carmalt: Fifteen cars, because the rating so provides that it is based on the shipments made in the aggregate during the preceding month.

Commissioner Potter: If its rating should be reduced by the amount of coal consumed at the mine mouth, why shouldn't it be reduced similarly by the amount of coal shipped over Line A, if you please?

Mr. Carmalt: Your theory being that that is a physical limitation upon the mine to ship.

Commissioner Potter: Yes. In other words, should not you work it out, not on basis of 100 per cent of capacity, but whatever you get from one line? Should not that be deducted in determining your capacity rating——

Mr. Carmalt: I think, as I said, that that is the strongest argument that can be made toward the limitation of the right of the junction point mine to ship. But why should that limitation be made in order to prevent discrimination? I do not think that discrimination exists.

Commissioner Potter: Is not that necessary in the interest of honesty? If a man had ten carloads of applies to ship, you would not permit him to represent that he had twenty carloads to ship, and thus obtain cars on basis of twenty carloads. If a man only has ten cars of coal to ship, why should you permit him to represent that he [fol. 159] has twenty?" (Record, 410-411.)

The Commission has passed upon this question in other cases and has uniformly held that in times of car shortage no shipper has the right to receive cars based on orders in excess of his capacity to load on a given day. California Fruit Growers' Exchange v. S. P. Co., 12 I. C. C. 553; Railroad Commission of Iowa v. C. R. I. P. Ry. Co., 47 I. C. C. 396; Farmers' Elevator Co. v. C. M. & St. P. Ry. Co., 47 I. C. C. 475; Tanner & Co. v. C. B. & Q. R. R. Co., 53 I. C. C. 401. The doctrine of these cases is that when carriers are unable to supply 100 per cent of the demands upon them, they should divide their facilities of carriage in accordance with the quantity of goods which the different shippers have ready for immediate shipment, i. e., the quantity of goods which the different shippers can actually or constructively tender for transportation at the time of the demand for service. While the commodities involved in the cases cited were commodities susceptible of actual tender at the time of the demand for cars, while generally speaking coal is not, it was said in the Tanner Case, supra (page 406), that—

"Coal is shipped as mined and the amount that may be considered ready for shipment is the amount that can be mined, loaded, and forwarded from day to day."

While, in the California Fruit Growers' Association Case, supra, it was held specifically (page 560) that—

"A mine can not in good faith ask for more cars than it can load."

[fol. 160] The decision herein is directly in the teeth of that doctrine as it will permit a joint mine to make a theoretical tender of 150 per cent of its capacity and to receive cars on that basis. Such a basis is purely artificial and to permit it to be the foundation of a legal right would transgress the letter and spirit of the Interstate Commerce Act.

(b) Your petitioners further show that the report of the Commission herein makes no reference to the important contention that—

Paragraph 12 of section 1 of the act requires carriers in times of car shortage, to make a pro-rata distribution of coal cars among the mines by maintaining and applying just and reasonable ratings of the mines and counting each and every car furnished to or used by any such mine against the mine.

This contention was made on pages 17-23 of the brief filed by the West Virginia local-mine operators, and on pages 7-8 of the brief filed by the Fifth and Ninth Districts Coal Bureau. It was referred

to at length at the oral argument both by counsel for the local-mine operators (Record, 433-438) and by counsel for the complaining joint-mine operators (Record, 406-409).

It is impossible to reconcile the conclusions of the Commission herein with the amended statute. The ratings of the mines are not in issue, consequently it must be presumed that they comply with the law and are just and reasonable. In the distribution of coal cars in the times of car shortage, the amended statute requires that mine ratings (which, bear in mind, are presumed to be just and reasonable [fol. 161] so far as these cases are concerned) be not only maintained but also applied and furthermore that there be counted against the mines each and every car furnished to or used by any such mines for the transportation of coal. Your petitioners submit that if mine ratings are applied and each and every car used by the mines is counted, it will be mathematically impossible to permit one mine with a rating of 20 cars per day to receive equipment on the basis of an order for 20 cars and another mine with the same rating to receive cars on the basis of an aggregate order for 30 cars.

At the argument, counsel for the complainant joint-mine operators contended that the requirement of the statute "to count each and every car furnished to or used by any such mine for transportation of coal against the mine" was merely an incident of the requirement "to maintain and apply just and reasonable ratings." He stated "that the purpose of the counting of the cars was to establish reasonable ratings, and it is used in that connection." If the language of the law made it the duty of carriers to maintain just and reasonable ratings by counting each and every car furnished, there would be some support for counsel's contention. But the law does not read that way. The law makes it the duty of carriers to maintain and apply just and reasonable ratings and to count each and every car furnished to or used by any mine for the transportation of coal against the mine. The law makes the duty to count each and every car furnished to or used by the mine separate and distinct from the duty to maintain and apply just and reasonable ratings.

The question as to the correct interpretation of the particular para- [fol. 162] graph in the new law under which the complaint herein was filed is naturally one of the principal issues involved. The law requires the Commission to "execute and enforce the provisions of the Act," and consequently your petitioners submit that they have the right to know where the Commission stands on paragraph 12 of section 1 so far as this case is concerned.

(e) Your petitioners further show that, although the Commission's report refers to and analyzes all the contentions of the joint-mine operators, it does not even mention the contention made by the local-mine operators that—

To permit joint mines to receive cars based on aggregate orders in excess of their daily ratings, and thus to have a greater opportunity to use the blanket rates than local mines of the same ratings which are required to limit their orders to their ratings, would be

inconsistent with the fundamental principles underlying the group adjustment of rates.

This contention was made on pages 31–35 of the brief for the West Virginia local-mine operators, and was referred to at the oral argument. (Record, 442–443.)

All the complaining joint mines are located in districts wherein the rates from a wide expanse of territory are blanketed to all consuming markets. The effect of the decision of the Commission herein is to give joint mines a greater relative opportunity to ship on the blanket rates than is given to local mine with like ratings, although the fundamental purpose of the group adjustment is to [fol. 163] put all the mines upon an equality. Both the fundamental purpose and the particular groups in which these mines are located have been approved by the Commission. For example, the joint mine of the Fairmont & Cleveland Coal Company, the titular complainant herein, is located in the heart of the Fairmont District approximately 100 miles east of the western hem of the common rate blanket to points in so-called "affected territory" north of the Ohio River. In Hitchman Coal & Coke v. B. & O. R. R. Co., 16 I. C. C. 512, the Commission declined to break the blanket by prescribing lower than the group rates from certain local mines along the western hem of the blanket to points north of the Ohio River. In other words, the Commission refused to authorize a rate advantage commensurate with the geographical advantage of the complainant mines. Is it just, is it fair, after declining a rate advantage commensurate with the geographical advantage of local mines along the border of a group on the broad ground that such action would violate the fundamental principle of equality underlying the group adjustment, to bestow an extra car-supply advantage on a single joint mine in the heart of the same group that will clearly violate the group principle and every other principle of equality? Your petitioners submit that they are entitled to the Commission's answer to this question.

(d) Your petitioners further show that in its report the Commission ignored the contention that—

To permit joint mine to receive cars to a greater percentage of their ratings than local mines would gradually deprive the latter of their labor supply, a result which should be avoided in the public interest.

[fol. 164] The contention is referred to on pages 30–31 of the brief for the West Virginia interveners.

The importance of this feature of the situation has been recognized by the Commission. Hillsdale Coal & Coke Co. v. P. R. R. Co., 19 I. C. C. 365; Bulah Coal Co. v. P. R. R. Co., 20 I. C. C. 52, 54. In the Bulah Coal Co. Case, the Commission said:

"One of the evils lying at the root of the trouble is that the mine having a larger or more constant supply of cars may not only be operated at less cost, but what is equally if not more important, such a mine is able to attract miners from the other mines because of the

assurance it gives of a more constant opportunity to earn a daily wage."

The relative working time of mines depends absolutely upon their relative car supply. The miners employed in a local mine with a daily rating of 20 cars should be protected in their right to work as many hours per day as the miners employed in a joint mine with a daily rating of 20 cars. The Supreme Court of the United States has held (Texas & Pacific Ry. v. I. C. C., 162 U. S. 197, 219) that "all circumstances and conditions which reasonable men would regard as affecting the welfare of the carrying companies, and of the producers, shippers and consumers should be considered by the tribunal appointed to carry into effect and enforce the provisions of the Act," consequently the Commission should not ignore the interest and welfare of the mine employees in this proceeding.

Your petitioners submit and earnestly contend that, inasmuch as the Commission passed upon all the contentions of the joint-mine operators, it should pass upon the above contentions of the local-mine operators before finally adopting a rule which will concededly [fol. 165] prejudice the local-mine operators and their mine employees and favor the joint-mine operators and their mine employees.

4. Your petitioners further represent that the specific findings of fact in the report show on their face that the Commission erred in concluding that Rule 4 of Circular CS-31, Revised, is "unreasonable and unduly prejudicial to joint mines and unduly preferential of local mines." The rule provides that the aggregate rating of a joint mine, like the order of a local mine, must be limited to 100 per cent of its rating. The Commission holds that, in order to remove undue prejudice against joint mines and undue preference in favor of local mines, joint mines may be reasonably permitted to order from both railroads 150 per cent, instead of 100 per cent, of their ratings and to receive cars up to their ratings on that basis.

(a) On page 274 of the report of the Commission are the only specific findings of fact as to the actual effect of the operation of the rule in issue. These findings are as follows:

"The joint mines in the New River District, during the month of August, 1920, under the operation of the rule here complained of, received 1,392.6 cars from the Chesapeake & Ohio and 1,881.8 cars from the Virginian, or 167.3 cars more from the Chesapeake & Ohio and 48.2 cars less from the Virginian than they are entitled to. If they had been accorded a similar car supply as local mines with like ratings located on defendants' lines they would have received 2,104.9 cars from the Chesapeake & Ohio and 3,471.1 cars from the Virginian. These joint mines received 183.6 cars less on the Chesapeake & Ohio and 714.6 cars less on the Virginian than [fol. 166] they would have been entitled to during the said month under the rule approved by us in the Illinois Case."

The figures in the above findings were taken from Complainants' Exhibits 12 and 13, which show on their face that they cover only

the 11 joint mines of the New River Company and not, as the findings state, the (55) joint mines in the New River District. In condensed statement form, the figures are as follows:

	Number of cars entitled to during August, 1920	
	Under 100 per cent rule	Under 150 per cent rule
Supply of New River Company Joint Mines	3058.9	4172.6
Supply of Local Mines with like ratings on Chesapeake & Ohio	2104.9	2104.9
Supply of Local Mines with like ratings on Virginian	3471.1	3471.1
Average supply of Local Mines with like ratings on both roads	2788.0	2788.0
Excess supply of New River Joint Mines over average supply of local mines with like ratings on both roads	270.9	1384.6
	9.7%	51.4%

The above table, compiled from the Commission's own findings in this case, shows that even under the 100 per cent rule against which they are complaining, the joint mines have a substantial advantage in car supply (9.7 per cent on the average in August, 1920) over local mines with like ratings in the same district. While, during the representative month referred to, the joint mines mentioned received 412.2 cars less than local mines with like ratings on the Virginian, they received 954 cars more than local mines with like ratings on the Chesapeake & Ohio, or a net average advantage of 270.9 cars, and this showing was made under the very rule which the Commission condemns herein.

(b) The record (Complainants' Exhibits 16, 17, and 18) contains similar figures regarding the relative car supply of the Parker [fol. 167] Run Mine, the joint mine of the Fairmont & Cleveland Coal Co., the titular complainant herein, but for some reason the report of the Commission contains no reference thereto. The figures are as follows and cover the month of April, 1920:

	Number of cars entitled to during April, 1920	
	Under 100 per cent rule	Under 150 per cent rule
Parker Run Joint Mine	398	484
Local Mine with like rating in same district on Baltimore & Ohio	397	397
Local Mine with like rating in same district on Monongahela	266	266

This table, compiled from complainants' exhibits in this case, shows that the joint mine complainant in Nos. 12081 and 12082 actually received a better car supply than local with like ratings on the same roads in the same district under the very rule which the Commission holds is unduly prejudicial to this same joint mine.

The record herein (Exhibit No. 38) further shows, although the report of the Commission make no reference thereto, that during the period from March 1, 1920, to December 31, 1920, two other joint mines (Grant and Morgan) in the Fairmont District served by the Baltimore & Ohio and Monongahela received 3409.6 cars, or 55.1 per cent of their aggregate orders whereas all local mines and joint mines in the same district on those roads received (including assigned cars on the Monongahela) 203,543 cars, or 48 per cent of their aggregate orders. In other words, the two joint mines referred to received 7.1 per cent better car supply than the average of the local mines and joint mines.

The record also shows (Exhibit 39) that, during the period, March 1, 1920 to January 1, 1921, all the joint mines in the New River [fol. 168] District secured sufficient cars to run them the equivalent of 157.13 full working days, whereas the local mines in the same district secured sufficient cars to run them only 123.78 full working days. In its report, the Commission criticised this comparison as follows:

"The total cars supplied by both roads are divided by the average aggregate rating of both roads, and the result is shown as the equivalent of the number of full days worked. This statement is subject to the criticism that it takes the aggregate mine ratings rather than the number of cars ordered."

This criticism ignores the testimony of the car distributor of the New River Complainants to the effect that throughout the period referred to the joint mines ordered 100 per cent of their ratings from both the Chesapeake & Ohio and Virginian and that the roads reduced these orders 50 per cent, making the aggregate orders a total of 100 per cent of the ratings (Record, 84). But even though the mines, joint or local, did not order up to 100 per cent of their ratings, they had a right to do so under the rules, and consequently it is perfectly proper to divide the total cars received by the joint mines by their aggregate ratings, and the total cars received by the local mines by their aggregate ratings, in order to ascertain how the two classes of mines fared during a period when the rule attacked by the joint mines was in full force and operation.

(c) Furthermore, the Commission has passed upon this same question in two recent cases filed by Illinois operators. During Mines Co. v. Director General, 61 I. C. C. 265, 266; Ridge Coal Mining Co. v. M. P. R. R. Co., 62 I. C. C. 259, 261. In the Dering Mines Company Case, the Commission found that——

[fol. 169] "The benefit chiefly sought by complainants, however, is better car supply to the joint mine in times of car shortage. The record shows that the joint mine has an advantage in this respect."

While in the Ridge Coal Mining Company Case, the Commission found that——

"The record establishes that a joint or junction point mine has a decided advantage over a local mine in the matter of car supply as well as in other respects."

The above facts and findings show, and show conclusively, that the Commission erred in condemning the 100 per cent rule. The Commission's own findings of fact as to the actual operation of the rule prove that joint mines already have a substantial advantage over local mines with like ratings; furthermore, almost contemporaneously with the decision herein the Commission squarely finds in two other decisions that joint mines have a "decided advantage" over local mines "in the matter of car supply as well as in other respects." Under the circumstances there is absolutely no warrant for the Commission giving the joint mines an additional advantage of 50 per cent or any other per cent.

5. Your petitioners further show that the Commission erred in predicating its decision herein upon In re Irregularities in Mine Ratings, 25 I. C. C. 286. That proceeding was merely an arbitration proceeding with only one carrier respondent and, the other carriers serving joint mines not being parties, the Commission could not have been fully advised of the relative car supply of joint mines versus local mines with like ratings for any definite period. None of the major contentions urged herein by the local-mine operators [fol. 170] was urged in that case. Furthermore, that case was decided nearly nine years ago and in the meantime circumstances and conditions affecting the supply of cars to coal mines have radically changed and even the law applicable thereto amended.

The Commission erred in following In re Irregularities in Mine Ratings, decided in December, 1912, when it had before it Dering Mines Co. v. Director General, supra, and Ridge Coal Mining Co. v. M. P. R. R. Co., supra, decided only four days before the proceeding herein and in which the question of the car-supply advantage or disadvantage of joint mines over local mines in the same general territory (Illinois) as was involved in In re Irregularities in Mine Ratings was specifically passed upon. In striking contrast to the decision in the latter case, wherein the Commission in effect held that under the conditions then existing (1912) the 100 per cent rule operated to the undue advantage of local mines, the Commission found in the two recent decisions referred to that under the conditions existing in 1920-1921 the 100 per cent rule operated to the "decided advantage" of joint mines.

The Commission further erred in accepting and relying upon In re Iregularities in Mine Ratings as authority for its decision herein when there was pending for hearing before it a proceeding involving the same general questions affecting local mines and joint mines in the same general territory, to-wit: Docket No. 12362, Bell & Zoller Coal Co. et al. v. Baltimore & Ohio Southwestern R. R. Co.

et al. The hearing of the latter case will be a virtual rehearing of In re Irregularities in Mine Ratings with all Illinois railroads as respondents and consequently your petitioners submit that the Commission should have proceeded with that rehearing before accepting and affirming the conclusions reached in 1912.

[fol. 171] Your petitioners are informed and believe, and therefore state the fact to be, that there is a greater number of joint and junction-point mines in the state of Illinois, the territory involved in the Bell & Zoller Coal Co. Case, than in all the rest of the country combined. The joint-mine question has developed to a greater extent and has more ramifications in that state than in any state or district of the United States, therefore evidence of present conditions in that state is absolutely essential to the proper determination of any joint-mine rule of general application. In this connection, the following colloquy between Chairman Clark and counsel for the joint-mine operators at the oral argument herein is referred to:

"Chairman Clark: And, so far as outside evidence go, C. S. 31 is in effect in the Illinois district, and we are not hearing any complaints about it.

Mr. Carmalt: Oh, yes; you are. I beg your pardon. You have complaints here from practicaly all joint mines in the Illinois district.

Chairman Clark: I did not know that.

Mr. Carmalt: There are here. I do not know that any testimony has been taken; but they are both here. I believe fully that whatever rule the Commission adopts should be the rule adopted in all territory. I do not think we have any special rights in the New River district or in the Fairmont district." (Record, 422.)

6. Your petitioners further show that the application of the rule prescribed by the Commission is indefinite and uncertain in that the rule does not define the qualifications of a joint mine. The rule prescribed is apparently intended to be one of general application, [fol. 172] consequently it should specify the particular classes of mines which are entitled to receive the preferential car supply contemplated by its terms. If this is not done, different railroads are very likely to treat the same classes of mines in different ways so far as car distribution is concerned. This is true today in respect to the defendants herein.

For example, the record shows that the Chesapeake & Ohio and Virginian treat all mines on the Kanawha, Glen Jean & Eastern as joint mines. The latter line is an independent road, owning coal carrying equipment, and having no trackage arrangements with either of the two trunk-line connections named. (Record, 359, 372-373.)

It further appeared that all mines on what is known as the Stone Coal Branch in the New River District are treated as joint mines by the Chesapeake & Ohio and Virginian. This line is owned jointly by the two roads named. The record shows that both the

Chesapeake & Ohio and the Virginian had rights of way and were ready to build along Stone Coal Creek, but that later they agreed to build a singe line in order to avoid the double expense. The mines are served with cars by locomotives and crews of the Virginian, the expenses of which are divided between the two proprietary lines. (Record, 301-302, 315-316.)

On the other hand, the mines on the Monongahela Railway, which *is* owned jointly by the Pennsylvania and Pittsburgh & Lake Erie, are treated as local mines. The proprietary roads originally intended, and in fact started, to construct two lines into the territory served by the Monongahela, but later agreed "to construct and establish one line of railway" in order to avoid the "great cost involved [fol. 173] in constructing independent roads." While, under the agreement between the proprietary lines, they have the right to run their own locomotives and crews over the Monongahela, the mines on the Monongahela are served directly by the locomotives and crews of the Monongahela. The Monongahela owns no coal carrying equipment, and it must therefore look to the proprietary lines for its car supply. The Monogahela, on behalf of the mines on its line, orders the cars from the Pennsylvania and Pittsburgh & Lake Erie, in the same manner that the mines on the Stone Coal Branch order the cars from the Chesapeake & Ohio and Virginian. The only difference in the two situations is that the Monongahela is separately operated, while the Stone Coal Branch is not. But, on account of the joint ownership, the Monongahela must be regarded as part and parcel of the proprietary roads. C. M. & St. P. Ry. Co. v. Minneapolis Civic & Commerce Asso., 247 U. S. 490; Pacific Lumber Co. v. N. W. P. R. R. Co., 51 I. C. C. 738, 757; Richmond Chamber of Commerce v. S. A. L. Ry., 44 I. C. C. 455, 460. (Record, 221, 228; Ownership of Little Kanawha R. R. Co., 36 I. C. C. 560, 613, 638.)

In view of the above facts, your petitioners submit that, if the Commission adheres to its decision herein and insists upon the application of the 150 per cent rule or any other rule permitting joint mines to receive cars based upon orders for more than 100 per cent of their ratings, it should define the qualifications of a joint mine. In this connection your petitioners suggest the following definition:

This rule (the rule prescribed) shall apply to all mines which two or more carriers owe a legal obligation to serve with cars.

[fols. 174 & 175] Wherefore, your petitioners earnestly pray that the Commission reopen these cases for further consideration, that the report and decision herein be treated merely as a tentative report, and that these cases be set for further argument along with Docket No. 12362, Bell & Zoller Coal Co., et al. v. Baltimore & Ohio

Southwestern R. R. Co., et al., and for such other relief as may be deemed meet and just in the premises.

Slab Fork Coal Company, Scotia Coal & Coke Company, South Side Company, Turkey Knob Coal Company, Coal Run Coal Company, Branch Coal Company, Beechwood Coal & Coke Company, Greenwood Coal Company, Laurel Creek Coal Company, Quinnimont Coal Company, Maryland Coal & Coke Company, Star Coal & Coke Company, Ephriam Creek Coal & Coke Company, Stover Coal Company, By G. H. Caperton, George T. Bell, Their Agents and Attorneys Herein. Northern West Virginia Coal Operators' Association, By George S. Brackett, George T. Bell, Its Agents and Attorneys Herein. Fifth & Ninth Districts Coal Bureau, By P. H. Greenlaw, George T. Bell, Its Agents and Attorneys Herein. Washington, D. C., August 25, 1921.

[fol. 176] EXHIBIT C TO AMENDED ANSWER

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 12081

FAIRMONT & CLEVELAND COAL COMPANY

vs.

BALTIMORE & OHIO RAILROAD COMPANY

Docket No. 12082

FAIRMONT & CLEVELAND COAL COMPANY

vs.

MONONGAHELA RAILWAY COMPANY

Docket No. 12083

THE NEW RIVER COMPANY et al.

vs.

THE VIRGINIAN RAILWAY COMPANY

Docket No. 12084

THE NEW RIVER COMPANY et al.

vs.

THE CHESAPEAKE & OHIO RAILWAY

Petition to Reopen

Come now the Fairmont & Cleveland Coal Company, The New River Company, White Oak Fuel Company, White Oak Coal Com-

pany, Stuart Colliery Company, Dunnloop Coal & Coke Company, [fol. 177] Beckley Coal & Coke Company, Mabscott Coal & Coke Company and Cranberry Fuel Company, complainants in the above entitled proceedings, and with them the East Gulf Coal Company, Pemberton Fuel Company, Prince-Wick Coal Company, Pickshin Coal Company, Wood-Sullivan Coal Company, Tommy Creek Coal Company, Lillybrook Coal Company, Beckley Fire Creek Coal Company, E. E. White Coal Company, New River Collieries Company, Raleigh Coal & Coke Company, Gulf Smokeless Coal Company, Price Hill Colliery Company and E. C. Minter Coal Company, interveners in the said proceedings and petition this Honorable Commission to reopen these proceedings to take further testimony and for reargument upon brief, and orally, and as grounds for said petition, respectfully show:

I. That the order dismissing the complaints in these proceedings, entered on the 11th day of December, 1922, in so far as it purports to give authority to the railroad defendants to restore Rule 4 of Car Service Circular CS-31-Revised, is violative of property rights of your petitioners and unmindful of the common carrier obligations of the railroad defendants and is, therefore, without legal effect.

Your petitioners, by reason of their foresight and investment, have so located their properties as to receive, of right, the service of two or more carriers. In times of car shortage as well as in times of car plenty these coal operations have the legal right under the Interstate Commerce Act, and under the common law, to demand service from each of the railroads which hold themselves out to serve the mine tipples of your petitioners. Under Rule 4 of CS Circular 31 Revised, one or the other, or both of the railroads serving the [fol. 178] tipples are excused, in times of car shortage, from the obligation to serve the tipple by reason of service that may have been afforded by the other carrier. Illustrating this proposition, it may be assumed that a joint mine has a rating of twenty cars per day; that it is served by two railroads, one of which has a 60 per cent and the other a 40 per cent car supply and that the mine orders twenty cars from each railroad. Road A, having a 60 per cent car supply, will furnish 12 cars. The mine still has a capacity to ship 8 cars but, under the rule now approved by the Commission, Road B is not permitted to honor the order which the mine has made and the order of the Commission authorizes Road B under the above circumstances to refuse to honor the order of the mine for cars because Road A has given it 60 per cent of its capacity to ship. Such is not the law, either at common law or under the provisions of the Interstate Commerce Act.

II. That the Interstate Commerce Commission is without power under the Act to enter an affirmative order to require the carriers to restore Rule 4 of Circular CS-31 Revised. The Interstate Commerce Act provides, and the Supreme Court of the United States has again and again held that said Act does not take away or abridge the rights of shippers against common carriers or the obligations of such common carriers at common law. The Interstate Commerce

Act is supplementary to the common law and gives to shippers additional rights and crystallizes the obligations of common carriers. As shown by the illustration in the last preceding paragraph, the joint mine, like any other shipper, has the right to demand service from each carrier serving it in the same proportion of its available [fol. 179] equipment as have all other shippers on each railroad and the Interstate Commerce Commission cannot put a limitation upon this right without exceeding its statutory powers.

III. Rule 4 of Circular CS-31 Revised is inherently unreasonable. The Commission, in its report of December 11th, in these proceedings, states the operation of Rule 4 as follows:

"The operation of rule 4 is shown by the following example: A joint mine with a gross daily rating of 50 cars located on carriers A and B orders all of its cars from carrier A which has an 80 per cent car supply. The joint mine will receive the same number of cars as a local mine with a daily rating of 50 cars on carrier A. However, if carrier B has a 50 per cent car supply and the joint mine divides its order equally between the two carriers it will receive 80 per cent of 25 cars, or 20 cars, from carrier A, and 50 per cent of 25 cars, or 12.5 cars, from carrier B, a total of 32.5 cars compared with 40 cars received by the local mine on carrier A. Should the joint mine order more than half its cars from the carrier with the greater car supply this will change the figures somewhat, but in no instance will the joint mine receive as many cars as the local mine served by carrier A if the orders are divided. The complainants concede that the joint mine will, in the aggregate, receive more cars than the local mine located on the carrier with the lesser car supply, and it possibly may receive more cars on the average than the local mines of similar rating on both carriers."

Having previously recited that the joint mine, by reason of its location, has important advantages to which it is entitled and in the [fol. 180] reasonable enjoyment of which it should be protected, the Commission proceeds, by the paragraph above quoted, to illustrate that its approval of Rule 4 seriously impairs the advantages set out, for instance:

"The joint mine has available a more extensive and a more varied market for its coal."

The mine having established and built up these markets in time of car plenty, the Commission proceeds to take the advantage away in times of car shortage by the working of the rule as it itself sets it out and puts such mine on a lower basis than the local mine on the road having the larger car supply in every case and down nearer to the level, if not actually below the level, of the average of the local mines on both railroads. The operation of Rule 4 in times of car shortage puts the joint mine in a position of disadvantage by reason of its location.

IV. The operation of Rule 4 is prejudicial of the joint mine and preferential of the local mine. It must appear obvious from the quotation from the opinion regarding the operation of the rule that the joint mine located on railroads A and B received under Rule 4 less cars from each railroad, proportionately, than such railroad serves to its local mines. The Commission insists that the aggregate car supply received by the joint mine from both railroads must be taken as a basis of comparison with the local mines car supply, for purposes of consideration of Section 3 of the Interstate Commerce Act. Your petitioners deny that Section 3 of the Act authorizes the Commission to predicate an order of undue prejudice against a railroad by reason of the practices of another carrier.

[fol. 181] "If this were not so, the legality or illegality of a carrier's practice would depend, not on its own act, but on the acts of its connecting carriers. If that rule should prevail, only uniformity in local privileges and practices, or the cancellation of all joint rates, could afford to carriers the assurance that they were not in some way violating the provisions of Paragraph 3. What Congress sought to prevent by that section, as originally enacted, was not differences between localities in transportation rates, facilities, and privileges, but unjust discrimination between them by the same carrier or carriers. Neither the Transportation Act 1920, February 28, 1920, chap. 91, 41 Stat. at L. 456, nor any earlier amendatory legislation, has changed, in this respect, the purpose or scope of Paragraph 3."

(Central Railroad of New Jersey vs. United States, — U. S., — (1921.)

V. That the legal right of the joint mine is to receive its pro rata of the available cars of each railroad with the single limitation, in the public interest, that it shall not receive a greater number of cars in the aggregate than it has capacity to load. The decision of the Commission in the so-called Illinois case, 25 I. C. C. 286, was a limitation upon this right and not an extension of it. The rule laid down in that case, and approved by the Commission in the first decision of the instant cases, 62 I. C. C. 269, was acquiesced in by petitioners but only as it represented a practical way of giving certainty to the basis of ordering cars which would give to the joint mine a close approximation of the car supply to which it is legally entitled. The case made by the opponents of your petitioners has throughout been based upon the erroneous conception that undue prejudice and preference can be arrived at in the orders for cars. The contention of [fol. 182] your petitioners throughout these cases has been that preference or prejudice can only be determined upon the supply of cars. If a joint mine receives no more than its proportionate share of cars from each railroad the local mines on either one have no cause for complaint; if a mine, by reason of its location, receives additional cars from another railroad, to which the local mine under no car distribution rules could be entitled, such additional supply from the second railroad cannot cause a discrimination or prejudice of the local mine on the first road.

VI. The Commission is without power to predicate an order under the Act to Regulate Commerce in order to equalize the running time of mines. As pointed out in the dissenting opinion of Commissioner Potter—

"To do so would be to require discrimination in the use of equipment—not remove it. If a local mine is at a disadvantage it is not because of a transportation problem with which we may deal but because of a labor problem which is not for us."

In so far as the decision of the Commission is predicated upon an advantage that the joint mine may have in a labor supply by reason of the greater running time afforded to it under the rule of the Illinois case, the decision is in excess of the statutory powers of the Commission. Even in this regard, however, the Commission makes no specific finding that there is any advantage to the joint mine in labor supply and there is certainly no evidence in these proceedings upon which to predicate any such finding. To whatever extent such considerations have influenced the decision of the Commission they [fol. 183] would seem to represent a prejudgment of the assigned car rule now pending before the Commission in another proceeding.

VII. That the Commission acted in these cases without sufficient evidence. The Commission in its first decision in these cases found Rule 4 to be unreasonable and prejudicial, and also found what would be the reasonable rule and prescribed the same. The rule it prescribed was, in practical effect, the same as that that had been suggested in the Illinois case, Supra, and it was promptly put in effect by the four defendants in these proceedings. The experience thus had under the rule laid down in those cases was not before the Commission in the instant proceeding. An indication of what that experience was is given in the general investigation of the Commission into the car distribution rules, Docket No. 13896 but not at all in a comprehensive way. Exhibit No. 131 of the Chesapeake & Ohio in that proceeding shows that under the operation of the 75 per cent rule there was less inflation of ratings at joint mines than at local mines. The Commission will understand that the rating rule for joint mines was not in issue in the instant proceedings and no testimony in regard to such ratings was introduced. In fact it was expressly excluded by the Examiner. In the general Car Distribution inquiry it appears, by definite testimony, that the rule for rating joint mines gives to such mines no advantage over the local mines and, in fact, the same method of rating is employed. It is not disputed that the ratings of joint mines are not inflated to the extent as are the ratings of local mines, which, under Circular CS-31 Revised, are in position to and do inflate ratings in times of car shortage to a much greater extent than the joint mines.

[fols. 184 & 185] Wherefore, in view of the considerations above set out your petitioners earnestly pray that the Commission shall reopen these proceedings to take further testimony and to hear further ar-

gument upon such testimony and upon the legal principles that are involved in these proceedings.

Respectfully submitted, August G. Gutheim, James W. Carmalt, Attorneys for Petitioners. Dated at Washington, D. C., January 9, 1923. August G. Gutheim, 8 Jackson Place, Washington, D. C. James W. Carmalt, Southern Bldg., Washington, D. C.

[fol. 186] EXHIBIT D TO AMENDED ANSWER

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket 12081

FAIRMONT & CLEVELAND COAL COMPANY

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY

Docket No. 12082

FAIRMONT & CLEVELAND COAL COMPANY

vs.

MONONGAHELA RAILWAY COMPANY

Docket No. 12083

THE NEW RIVER COMPANY et al.

vs.

THE VIRGINIAN RAILWAY COMPANY

Docket No. 12084

THE NEW RIVER COMPANY et al.

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY

Answer of the Slab Fork Coal Company and Other Interveners to Complainants' Petition to Reopen

Now come the following-named interveners in the above-entitled proceedings, to wit: Slab Fork Coal Company, Scotia Coal & Coke Company, South Side Company, Turkey Knob Coal Company, Coal Run Coal Company, Branch Coal Company, Beechwood Coal & Coke Company, Greenwood Coal Company, Laurel Creek Coal Company, [fol. 187] Quinnimont Coal Company, Maryland Coal & Coke Com-

pany, Star Coal & Coke Company, Ephriam Creek Coal & Coke Company and Stover Coal Company, and by this their answer to complainants' petition to reopen these proceedings, respectfully show:

1. That, contrary to the statement in paragraph one of the petition, reading—

"That the order dismissing the complaints in these proceedings, entered on the 11th day of December, 1922, in so far as it purports to give authority to the railroad defendants to restore Rule 4 of Car Service Circular CS-31-Revised, is violative of property rights of your petitioners and unmindful of the common carrier obligations of the railroad defendants."

these interveners say that the said Rule 4, hereinafter referred to as the 100 per cent rule, fully recognizes the property rights of petitioners and the common carrier obligations of defendants. The 100 per cent rule fully recognizes the right of joint-mine operators to order and receive cars for loading coal from any or all of the railroads reaching these mines, but one of the purposes of the said rule is to compel such operators to accompany their orders for cars with the same bona fide concomitant tenders or setting aside of sufficient coal or sufficient output capacity to load and ship the aggregate number of cars ordered as is required of local-mine operators. The said rule also recognizes the common carrier obligations of defendants, but the obligation of defendants to furnish cars for loading coal is [fol. 188] not called into play unless and until the orders for cars by whomsoever placed are accompanied by actual or constructive tenders of sufficient coal to load the aggregate number of cars ordered on the particular day for which the cars are ordered.

That, in respect to the following statements in paragraph one of the petition—

"Your petitioners, by reason of their foresight and investment, have so located their properties as to receive, of right, the service of two or more carriers. In times of car shortage as well as in times of car plenty these coal operations have the legal right under the Interstate Commerce Act, and under the common law, to demand service from each of the railroads which hold themselves out to serve the mine tipples of your petitioners. Under Rule 4 of CS Circular 31 Revised, one or the other, or both of the railroads serving the tipples are excused, in times of car shortage, from the obligation to serve the tipple by reason of service that may have been afforded by the other carriers."

these interveners say that the 100 per cent rule specifically recognizes the right of joint-mine operators "to receive service of the two or more carriers serving their mines"; that the said rule does not abridge the right of such operators "to demand service from each of the railroads which hold themselves out to serve the mine tipples" of petitioners; that under the said rule none of the railroads reaching joint mines is excused from the obligation to serve such mines by reason of any service afforded by the other carrier or carriers when

the demands for service, i. e., orders for cars, are accompanied by [fol. 189] bona fide concomitant tenders or setting aside of sufficient coal or sufficient output capacity to load the aggregate number of cars ordered on the particular day for which the cars are ordered.

That, in respect to the following statements in paragraph one of the petition—

"Illustrating this proposition, it may be assumed that a joint mine has a rating of twenty cars per day; that it is served by two railroads, one of which has a 60 per cent and the other a 40 per cent car supply and that the mine orders twenty cars from each railroad. Road A, having a 60 per cent car supply, will furnish 12 cars. The mine still has a capacity to ship 8 cars, but, under the rule now approved by the Commission, Road B is not permitted to honor the order which the mine has made and the order of the Commission authorizes Road B under the above circumstances to refuse to honor the order of the mine for cars because Road A has given it 60 per cent of its capacity to ship. Such is not the law, either at common law or under the provisions of the Interstate Commerce Act."

these interveners point out that other rules in Car Service Circular CS-31, Revised, not here in issue and not contested by complainants, require that all orders for cars by whomsoever presented shall be placed the day before the cars are to be loaded, consequently the example illustrated is unworkable, and complainants practically so conceded in their answer (page 5) to interveners' petition for reconsideration and reargument of these cases after the first decision therein. The illustration is unworkable and impracticable because, after Road A had furnished the joint mine with 12 cars on a given day, it would be too late for Road B to honor any orders for cars for [fol. 190] loading on that day. It would not only be physically impossible for Road B to honor any order for cars for loading on that day, but any attempt on its part so to do would be contrary to the rule requiring orders for cars to be placed the day before the cars are to be loaded. Illustrating this proposition it may be assumed that the joint mine with a rating of 20 cars per day referred to in the above quotation from the petition desired to order 20 cars for Tuesday's loading from Road A. Under the rules, this order for cars would have to be placed on Monday, i. e., the day before the cars are desired for loading. On Tuesday Road A places 12 cars at the joint mine, and the mine proceeds to load them. Petitioners say that—

"The mine still has a capacity to ship 8 cars,"

but it is now too late for the mine to order 8 cars for loading on Tuesday from Road B. Road B has already distributed its available cars for loading on that day, and in any event other rules in Car Service Circular CS-31, Revised, require that orders for cars for Tuesday's loading shall be placed on Monday. Contrary to the quoted statement in the petition that the 100 per cent rule in Road B's authority for not honoring on Tuesday an order for 8 cars presented on Tuesday, these interveners say that the physical exigencies

of the situation make it impossible and impracticable for Road B to honor on Tuesday any order for cars presented on Tuesday, and furthermore that other rules, not here in issue and not questioned by complainants, constitute Road B's authority for not attempting to honor on a given day orders for cars presented on the same day. [fol. 191] Furthermore, when the joint mine in the above illustration ordered its daily rating of 20 cars from Road A for Tuesday's loading, it tendered and set aside its entire capacity for that day; it had no coal or capacity left to make the subject of a tender to Road B on that day. Road B is not obligated "either at common law or under the provisions of the Interstate Commerce Act," to pay any attention to, much less attempt to honor, bogus or counterfeit tenders.

II. That, in respect to the following statements in paragraph two of the petition—

"as shown by the illustration in the last preceding paragraph, the joint mine like any other shipper, has the right to demand service from each carrier serving it in the same proportion of its available equipment as have all other shippers on each railroad and the Interstate Commerce Commission cannot put a limitation upon this right without exceeding its statutory powers"—

these interveners say that the right of a joint mine operator to demand service is measured, like that of any other shipper, by his ability and capacity to accompany his demands by a bona fide, concomitant tender or setting aside, actual or constructive, of the property to be shipped as of the day on which it is to be shipped. Under the rules a local mine is not permitted to order cars in excess of its rating on any day, i. e., its order is not recognized to the extent that it is unaccompanied by a bona fide, concomitant tender of capacity to load the number of cars ordered. Under the 100 per cent rule, a [fol. 192] joint mine is not permitted to order cars in excess of its aggregate rating on any day because it is physically impossible for a joint mine to tender on a given day more coal than it can produce and make ready for shipment on that day. The 100 per cent rule does not require a joint mine to split its tender of coal among the two or more roads serving it. It may tender its entire output to the particular railroad having the greatest available car supply on a given day, in which event it will receive the same pro rata distribution of cars as a local mine on the same road making the same tender. If it exercises its right to split its tenders, i. e., to tender part of its output to one road and part to another, it will receive the same pro rata distribution of cars as the local mines making similar tenders to those particular roads. The 100 per cent rule prevents joint mine operators from attempting to place orders for cars with bogus or counterfeit tenders, and is clearly within the statutory powers of the Commission to approve or to refuse to disturb upon complaint of such operators.

III. That, in paragraph three of the petition, after quoting from the December 11, 1922, decision of the Commission to the effect that

"the joint mine has available a more extensive and a more varied market for its coal," it is stated:

"The mine having established and built up these markets in times of car plenty, the Commission proceeds to take the advantage away in times of car shortage by the working of the rule as it itself sets [fol. 193] it out and puts such mine on a lower basis than the local mine on the road having the larger car supply in every case and down nearer to the level, if not actually below the level, of the average of the local mines on both railroads. The operation of Rule 4 in times of car shortage puts the joint mine in a position of disadvantage by reason of its location."

These interveners deny that the 100 per cent rule takes away in times of car shortage the advantage of a more extensive and more varied market for coal enjoyed by a joint mine. The 100 per cent rule does not deprive the joint-mine operator of his right, derived from the location of his mine on two or more roads, to tender the entire output of the mine to one of such roads or to split his tenders among the several roads in any manner he may choose. If he splits his tenders, the fact that his mine may secure a lesser number of cars than some local mine of the same rating or some joint mine of the same rating which does not split its tender is not the fault of the rule, but the logical result of his own voluntary act of choice in the matter. As the Commission said on page 439 of its report of December 11, 1922—

"Whenever the joint mine orders cars from the different carriers serving it, it is doubtless due to other compensating advantages which outweight those of a temporary greater car supply, and such election is the voluntary choice of the shipper."

These interveners also deny that the operation of the 100 per cent rule in times of car shortage puts the joint mine in a position of disadvantage by reason of its location. In Dering Mines Co. v. Director [fol. 194] General, 62 I. C. C. 265, and Ridge Coal Co. v. M. P. R. R. Co., 62 I. C. C. 259, the Commission made an exhaustive investigation of the advantages and disadvantages of local and joint mines under the 100 per cent rule, and found—

"that a joint or junction point mine has a decided advantage over a local mine in the matter of car supply as well as in other respects."

IV. That in respect to the following allegations of paragraph four of the petition—

"The operation of Rule 4 is prejudicial of the joint mine and preferential of the local mine. It must appear obvious from the quotation from the opinion regarding the operation of the rule that the joint mine located on railroads A and B received under Rule 4 less cars from each railroad, proportionately, than such railroad serves to its local mines. The Commission insists that the aggregate car supply received by the joint mine from both railroads must be taken

as a basis of comparison with the local mines' car supply, for purposes of consideration of Section 3 of the Interstate Commerce Act. Your petitioners deny that Section 3 of the Act authorizes the Commission to predicate an order of undue prejudice against a railroad by reason of the practices of another carrier."

these interveners deny that the 100 per cent rule is prejudicial to the joint mine and preferential to the local mine. On the contrary, it [fol. 195] compels the joint mine, as the local mine is compelled by other rules, to make a bona fide, concomitant tender of capacity to load the aggregate number of cars ordered on the day for which the cars are ordered. The joint mine on railroads A and B receives, not a lesser number of cars, but precisely the same number of cars as do the local mines on either road making similar tenders of coal for shipment.

By declining to hold that the 100 per cent rule is unlawful, the Commission does not insist that the aggregate car supply received by the joint mine from both railroads be taken as a basis of comparison with the local mines' car supply for purposes of consideration of Section 3 of the Act. The original complaints filed by the petitioners herein alleged, among other things, that the 100 per cent rule is unduly prejudicial to joint mines in violation of Section 3 of the Act. The burden of proof was upon complainants, petitioners herein, to sustain this allegation. In support thereof, complainants introduced certain exhibits comparing the aggregate number of cars received by joint mines with the aggregate number of cars received by local mines with like ratings on each of the roads serving the joint mines. Certain of these exhibits (Nos. 16, 17 and 18) showed that, during April, 1920, when the 100 per cent rule was in effect, the Parker Run joint mine of the titular complainant was entitled to receive 398 cars from the Baltimore & Ohio and Monongahela, while local mines with like ratings on the same roads were entitled to receive only 397 cars and 266 cars, respectively. Certain other of these exhibits (Nos. 12 and 13) showed that during August, 1920, when the 100 per cent rule was in effect, the joint mines of the New River Company were entitled to receive 3,058.9 cars from the Chesapeake & [fol. 196] Ohio and Virginian, while local mines with like ratings on both roads were entitled to receive an average of only 2,788 cars. By reversing its findings and conclusions in Fairmont & Cleveland Coal Co. v. B. & O. R. R. Co., 62 I. C. C., 269, the Commission in effect decided that the complainants, petitioners herein, had not sustained the burden of proof and that the foregoing comparisons did not indicate that the joint mines were unduly prejudiced by the operation of the 100 per cent rule. The Commission has not predicated an order of undue prejudice or any other order against any of the defendants by reason of the practices of another carrier. The only order which the Commission has entered in these cases is one dismissing the complaints and this order was entered because the complainants, petitioners herein, utterly failed to prove what they had charged in their complaints. The decision of the Supreme Court

of the United States in Central Railroad of New Jersey v. United States, cited by petitioners, has no application to such a situation.

V. That, in respect to the following statements contained in paragraph five of the petition—

"That the legal right of the joint mine is to receive its pro rata of the available cars of each railroad with the single limitation, in the public interest, that it shall not receive a greater number of cars in the aggregate than it has capacity to load. The decision of the Commission in the so-called Illinois case, 25 I. C. C. 286, was a limitation upon this right and not an extension of it. The rule laid down [fol. 197] in that case, and approved by the Commission in the first decision of the instant cases, 62 I. C. C. 269, was acquiesced in by petitioners but only as it represented a practical way of giving certainty to the basis of ordering cars which would give to the joint mine a close approximation of the car supply to which it is legally entitled. The case made by the opponents of your petitioners has throughout been based upon the erroneous conception that undue prejudice and preference can be arrived at in the orders for cars. The contention of your petitioners throughout these cases has been that preference or prejudice can only be determined upon the supply of cars. If a joint mine receives no more than its proportionate share of cars from each railroad the local mines on either one have no cause for complaint; if a mine, by reason of its location, receives additional cars from another railroad, to which the local mine under no car distribution rules could be entitled, such additional supply from the second railroad cannot cause a discrimination or prejudice of the local mine on the first road."

these interveners say that the maximum measure of the legal right of a joint mine is to receive its pro rata share of the available cars from each of the roads serving it, such pro rata shares being based upon the percentage which its bona fide, concomitant tender to each road bears to the total bona fide, concomitant tenders made to each such road. The decision in the so-called Illinois Cases, 25 I. C. C. 286, was an unwarranted extension of the foregoing rule as it permitted a joint mine with a daily rating of 100 cars to receive its pro rata share of the available cars based upon bona fide tenders aggregating 100 carloads of coal, and an additional share of the available cars based [fol. 198] upon artificial tenders of 50 carloads of coal. Under the 150 per cent rule prescribed in the Illinois Case, a joint mine with an aggregate daily rating of 100 cars was permitted to make a bona fide tender of 50 carloads of coal to Railroad A, a similar bona fide tender to Railroad B, and a bogus tender of 50 carloads to Railroad C; and Railroad C, in arriving at the pro rata shares of the respective mines, was required to give the same weight and consideration to this tender of 50 carloads by the joint mine as it gave to a bona fide tender of 50 carloads by a local mine. Such a rule or any rule permitting a joint mine to make bogus tenders of more coal than it can produce and make ready for shipment on a given day is based upon a fundamental misconception of the common carrier obligations of

railroads both at common law and under the Interstate Commerce Act.

With special reference to the statement that—

"The case made by the opponents of your petitioners has throughout been based upon the erroneous conception that undue prejudice and preference can be arrived at in the orders for cars."

these interveners again point out that the burden of proof was upon petitioners to prove that the 100 per cent rule was unduly prejudicial to joint mines and not upon the interveners to show that it was not unduly preferential to local mines. However, these interveners contend that a reasonable request for cars, i. e., an actual or constructive tender of sufficient coal ready for immediate shipment to load the number of cars ordered is a prerequisite to the duty of the carriers to furnish any cars whatsoever, or even to consider the order. The [fol. 199] legal tender must come first. If the order is based upon a bogus tender, if it is based upon false representations regarding the capacity of the joint mine to produce and make ready for immediate shipment, it is entitled to no more consideration than the request of a bystander who has no coal to ship.

VI. That, in respect to the following statement in paragraph six of the petition—

"The Commission is without power to predicate an order under the Act to Regulate Commerce in order to equalize the running time of mines. As pointed out in the dissenting opinion of Commissioner Potter:

'To do so would be to require discrimination in the use of equipment—not remove it. If a local mine is at a disadvantage it is not because of a transportation problem with which we may deal but because of a labor problem which is not for us.'

In so far as the decision of the Commission is predicated upon an advantage that the joint mine may have in a labor supply by reason of the greater running time afforded to it under the rule of the Illinois case, the decision is in excess of the statutory powers of the Commission."

these interveners say that the Commission has entered no order designed and intended to equalize the running time or labor supply of mines, and in the very next sentence in the petition—

[fol. 200] "Even in this regard, however, the Commission makes no specific finding that there is any advantage to the joint mine in labor supply," etc.

the petitioners themselves in effect concede that the Commission did not predicate its action in dismissing the original complaints upon any finding, conclusion or opinion that the running time and labor supply of joint mines and local mines should be equalized, nor upon any purpose, design or intent to bring about any such equalization.

The original complaints filed by petitioners were levelled at the

100 per cent rule and alleged, among other things, that the said rule is unjust, unreasonable and unduly prejudicial to joint mines and unduly preferential of local mines. In assuming the burden of proving these allegations, the complainant companies, petitioners herein, introduced numerous exhibits and computations based upon the relative car supplies of joint mines and local mines in the same district under the operation of the 100 per cent rule. In opposition to the exhibits and computations introduced by complainants, these interveners introduced two exhibits and computations also based upon the relative car supplies of joint mines and local mines in the same coal producing districts. One of these latter exhibits (No. 39) showed that during the period from March 1, 1920, to but not including January 1, 1921, a period when the 100 per cent rule was in full force and operation, the joint mines, including the joint mines of complainants in Docket Nos. 12,083 and 12,084, in the New River District of West Virginia received sufficient cars to keep them running the equivalent of 157.13 full working days, whereas the local mines, [fol. 201] including the mines of these interveners, received sufficient cars to keep them running the equivalent of only 123.78 full working days. In its first decision in these cases (Fairmont & Cleveland Coal Co. v. Baltimore & Ohio R. R. Co., 62 I. C. C. 269, 275) the Commission stated that this comparison—

"is subject to the criticism that it takes the aggregate mine ratings rather than the number of cars ordered,"

but in their petition for rehearing these interveners pointed out, as the record showed (page 84), that throughout the period in question the complainants in the New River District had ordered 100 per cent of their ratings from both the Chesapeake & Ohio and the Virginian and that the said roads reduced these orders 50 per cent, making the aggregate orders a total of 100 per cent of the ratings.

The other exhibit and computation introduced by these interveners (No. 38) showed that, during the same period, two joint mines in the Fairmont District served by the Baltimore & Ohio and Monongahela Railways, the district wherein is located and the roads serving, the joint mine of the complainant in Docket Nos. 12081 and 12082, received a 7.1 per cent better car supply than the average of the local mines and joint mines.

These interveners conceded then and concede now that the joint mines are entitled as a matter of right to advantages in car supply and running time such as are represented by the foregoing comparisons, which advantages result directly from their advantages of location on more than one railroad and which are fully recognized and protected [fol. 202] under and by virtue of the operation of the 100 per cent rule. These interveners did not and do not ask the Commission to deprive joint mines of such advantages of location, nor to deprive them of any other right or rights by equalizing the running time or labor supply of joint mines and local mines, or in any way whatsoever. And nothing in the order dismissing the complaints requires the defendant carriers to equalize the running time or labor supply of joint mines and local mines, or in any way whatsoever requires

the said defendants to deprive the complainant joint mines of anything.

These interveners point out that their references and contentions in brief and argument regarding the relative labor supply of joint mines and local mines were made in opposition to complainants' insistent demand for a measure of car supply above and beyond their right under Section 1 and in opposition to complainants' charge of undue prejudice under Section 3, and these interveners further point out that the Supreme Court of the United States has decided that whether a given situation is unduly prejudicial is a question of fact (Interstate Commerce Commission v. Alabama R. R. Co., 168 U. S. 144, 170), and that in passing upon such a question the Commission is empowered to consider and should consider—

All circumstances and conditions which reasonable men would regard as affecting the welfare of the carrying companies, and of the producers, shippers and consumers (Texas & Pacific Ry. v. I. C. C., 126 U. S. 197, 219),

and these interveners say that the running time of mines directly affects the welfare of coal operators, their employees, their customers and the public.

[fol. 203] VII. That, in respect to the following statement in paragraph seven of the petition—

"That the Commission acted in these cases without sufficient evidence,"

these interveners again point out that the burden of presenting sufficient evidence to sustain the allegations of the complaints was upon the complainants, petitioners here, and as the said complainants failed to sustain the burden and to prove the allegations of the complaints, there was nothing left for the Commission to do but dismiss the complaints.

In any event, these interveners call attention to the following Rule 15 (c) of the Commission's Rules of Practice reading:

"If the application be * * * for reopening the proceeding to take further evidence, the nature and purpose of the evidence to be adduced must be briefly stated and it must appear not to be merely cumulative."

The petition "to reopen these proceedings to take further testimony" does not comply with the said Rule 15 (c) of the Rules of Practice, as it does not state the nature and purpose of the further evidence proposed to be adduced nor whether the further evidence would or would not be cumulative. In the following statement in the petition—

"The Commission in its first decision in these cases found Rule 4 to be unreasonable and prejudicial and also found what would be the [fol. 204] reasonable rule and prescribed the same. The rule it pre-

scribed was, in practical effect, the same as that that had been suggested in the Illinois case, supra, and it was promptly put in effect by the four defendants in these proceedings. The experience thus had under the rule laid down in those cases was not before the Commission in the instant proceeding. An indication of what that experience was is given in the general investigation of the Commission into the car distribution rules, Docket No. 13896 but not at all in a comprehensive way."

petitioners seem to indicate that some of the further evidence proposed to be introduced would relate to the "experience" had under the 150 per cent rule. In respect to this proposed evidence, interveners say that the 150 per cent rule is not in issue in these cases and consequently evidence of "experience" under the operation of that rule would be irrelevant and immaterial.

In the following statements of the petition—

"Exhibit No. 131 of the Chesapeake & Ohio in that proceeding shows that under the operation of the 75 per cent rule there was less inflation of ratings at joint mines than at local mines. The Commission will understand that the rating rule for joint mines was not in issue in the instant proceedings and no testimony in regard to such ratings was introduced. In fact it was expressly excluded by the Examiner. In the general Car Distribution inquiry it appears, by definite testimony, that the rule for rating joint mines gives to such mines no advantage over the local mines and, in fact, the same method of rating is employed. It is not disputed that the ratings of joint mines are not inflated to the extent as are the ratings of local mines, which, under Circular CS-31 Revised, are in position to [fol. 205] and do inflate ratings in times of car shortage to a much greater extent than the joint mines."

petitioners seem to indicate in one breath that part of the proposed evidence to be introduced would relate to mine ratings and the inflation thereof, and in the next breath to concede that the question of mine ratings and the inflation thereof is not in issue in these cases and that consequently evidence bearing thereon would be irrelevant and immaterial. These interveners agree that the question of mine ratings and the inflation thereof is not in issue and, as stated in the petition to reopen, testimony in regard to mine ratings "was expressly excluded by the Examiner." And these interveners show that the said testimony in regard to mine ratings was excluded by the Examiner upon the objection of counsel for complainants, petitioners herein, and the said counsel is one of the same counsel whose names appear as counsel on the petition to reopen. (See Record 102; petition to reopen.) And, furthermore, these interveners deny and dispute the statement that the ratings of joint mines are less inflated than the ratings of local mines, and that the said Exhibit No. 131 so proves, but on the contrary these interveners say that the ratings of joint mines are inflated as much or more than the ratings of local mines and that one reason why defendants do not correct and reduce the inflated ratings of joint mines to as great an extent as they contemporaneously correct and reduce the inflated ratings of

local mines is the fear of traffic reprisals by the joint mines and that this very condition of discriminatory flexibility and variation in the determination and correction of ratings is one of the questions before the Commission in Docket No. 13896, the said General Car Distribution Inquiry.

[fol. 206] These interveners contend that the Commission would not be justified in reopening these cases for the purpose of receiving evidence regarding matters which are clearly not in issue. In this connection, these interveners point out that in Complainant's Answer (page 9) to Interveners' Petition for Reconsideration, Reargument and Consolidation of these cases with Docket No. 12362, Bell & Zoller Coal Company v. Baltimore & Ohio R. R. Co., et al., the said complainants, petitioners, here insisted—

"that all of the questions in issue in these proceedings were fully considered by the Commission,"

and in Complainants' Answer (paragraph 3) to Interveners' Motion for Temporary Order filed in Docket No. 13896, In Re Rules and Regulations Governing Distribution of Coal Cars, the said complainants, petitioners here, contended that the instant proceedings—"are submitted by the Commission after full hearing."

VIII. That interveners, having fully answered each and every allegation and ground of complainant's petition to reopen, present this further reason why the said petition should be denied:

On June 17, 1922, the Commission on its own motion entered upon a general investigation of the reasonableness and propriety of all rules and regulations governing the rating of coal mines and [fol. 207] the distribution of coal cars, including the 100 per cent rule in issue herein, Docket No. 13896, in Re Rules and Regulations Governing Distribution of Coal Cars, etc. Petitioners here are parties to that proceeding and counsel for petitioners took an active part in that proceeding.

On November 16, 1922, during the hearing in the said Docket No. 13896, interveners in the instant cases filed a Motion for Temporary Order asking the Commission to require the carriers defendant in the instant cases to cancel the so-called 150 per cent rule which they had been given authority temporarily to observe by the first decision herein, and to restore and apply the 100 per cent rule until the further order of the Commission. The Commission took the said motion under advisement and, on December 11, 1922, handed down a second decision in the instant cases and, by reversing the first decision, in effect approved the 100 per cent rule and withdrew its previous grant of authority to defendants to deviate therefrom. On page 443 of its second report, however, the Commission stated:

"The present decision is of course without prejudice to such determination of the questions before us in the general proceeding indicated as involving the mine rating and car-distribution rules as the record may there require."

It is thus seen that the issues in the instant cases are still before the Commission in Docket No. 13896, and also that the second decision of the Commission in the instant cases is without prejudice to the determination of the issues involved in the said Docket No. 13896. These interveners therefore contend that any further representations, contentions or arguments which petitioners desire to [fol. 208] present to the Commission in respect to the 100 per cent rule or any other rule involved in the said Docket No. 13896 should be made and submitted in that proceeding.

Wherefore, interveners pray the Commission to deny the petition to reopen the instant proceedings and to refer petitioners to Docket No. 13896, In Re Rules and Regulations Governing Distribution of Coal Cars, etc., as the proper proceeding in which to make further representations, arguments and contentions in respect to Rule 4 of CS-31, Revised.

Dated at Washington, D. C., January 26, 1923.

Slab Fork Coal Company, Scotia Coal & Coke Company, South Side Company, Turkey Knob Coal Company, Coal Run Coal Company, Branch Coal Company, Beechwood Coal & Coke Company, Greenwod Coal Company, Laurel Creek Coal Company, Quinnimont Coal Company, Maryland Coal & Coke Company, Star Coal & Coke Company, Ephriam Creek Coal & Coke Company, Stover Coal Company, Interveners, By George T. Bell, Their Attorney. George T. Bell, Woodward Building, Washington, D. C.

[fol. 209] EXHIBIT "E" TO AMENDED ANSWER

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket Nos. 12081-12084

The West Virginia Joint Mine Cases

ABEND COAL COMPANY, BENTON, BIG MUDDY COAL COMPANY, Breese-Trenton Mining Company, Carterville & Big Muddy Coal Company, Chicago-Springfield Coal Company, Columbia Collieries Company, Egyptian Coal & Mining Company, Fallon Coal Mines Company, General Coal & Mining Company, Gillespie Coal Company, Kolb Coal Company, Liberty Coal & Mining Company, Lou-Nash Coal & Mining Company, Midway Coal Mining Company, Moffat Coal Company, Mount Olive and Staunton Coal Company, Nashville Mining Company, New Prosperity Coal Company, O. K. Coal Company, Paradise Coal Company, Penwell Coal Mining Company, Perry County Coal Corporation, Rowan Mining Company, St. Louis Coal Company, Security Coal & Mining Company, Spoon River Colliery Company, Star Coal & Mining Company, Superior Mining Company, Wasson Coal Company, By George T. Bell, Their Attorney

Petition and Answer of Security Coal & Mining Company and Other Illinois Local Operators to Complainant's Petition to Re-open

[fol. 210] Now come the Security Coal & Mining Company, Paradise Coal Company, Penwell Coal Mining Company and other Illinois local-mine operators, hereinafter referred to as Illinois interveners, and by this their petition and answer to complainants' petition to reopen, respectfully show:

I. That the said Illinois interveners were interveners of record in Docket No. 12362, Bell & Zoller Coal Co. et al. v. B. & O. S. W. R. R. Co., et al., which case was consolidated, argued and submitted with the so-called West Virginia Joint Mine Cases, the complainants in which cases are now seeking to reopen the proceedings for further hearing. The said Illinois interveners respectfully aver that all these [fol. 211] joint mine cases involve fundamental questions of law and great principles of equality of opportunity and that necessarily whatever conclusion is finally reached by the Commission for application in West Virginia must apply as well in Illinois and other states of the United States. And the said Illinois interveners further show that at the first oral argument in the West Virginia Joint Mine Cases, Fairmont & Cleveland Coal Co. v. B. & O. R. R. Co., counsel for the complainant joint mine operators therein stated (record 422) in answer to a question by the presiding Commissioner:

"I believe fully that whatever rule the Commission adopts should be the rule adopted in all territory. I do not think we have any

special rights in the New River District or in the Fairmont District."

Upon the foregoing facts and circumstances, the said Illinois interveners aver that they have a direct and vital interest in the so-called West Virginia Joint Mine Cases and in complainants' petition to reopen the said cases and in whatever disposition the Commission may make of the said petition, and they therefore respectfully but earnestly request the Commission to consider this their answer to the said petition to reopen.

II. That the said Illinois interveners hereby adopt as their own the answer of the Slab Fork Coal Company and other West Virginia local mine operators to complainants' petition to reopen in so far as it is applicable and as it refers to the fundamental questions of [fol. 212] law and the great principles of equality of opportunity involved and further answering the said petition the said Illinois interveners say:

III. That, in respect to the following statement in paragraph one of the petition:

"Your petitioners by reason of their foresight and investment, have so located their properties as to receive of right, the service of two or more carriers,"

these interveners shows that the mine of the complainant in Docket Nos. 12081 and 12082 was located and opened with a connection to only one railroad, to wit, the Baltimore & Ohio Railroad and that the Monongahela Railway was not then in existence but later built a line contiguous to the said complainant's property; and that the mines of the original complainants in Docket Nos. 12083 and 12084 were located and opened on what were formerly the Piney River & Paint Creek Railroad and White Oak Railway which railways, according to their reports (p. 5) to this Commission for the five months ended November 30, 1912, were built by proprietary coal companies—

"for the purpose of developing their property and to reach their mines and deliver coal to the Chesapeake & Ohio Railway"—

and that only by subsequent trackage arrangements which have been the subject of numerous bitter complaints to the Commission were [fol. 213] the said mines given a joint status. (Record, 124-127, 148; Allowances to Kanawha, Glen Jean & Eastern, 41 I. C. C., 53; Record, 17-18; Exhibit 1.)

And the said Illinois interveners further show that the record in Docket No. 12362, Bell & Zoller Coal Co. v. B. & O. S. W. R. R. Co. shows that numerous joint mines in Illinois secured a joint status without the exercise of any so-called "foresight" and without the investment of a single dollar by their owners, and in its decision therein the Commission among other things — *ing*—

"Certain joint mines in Illinois and Indiana have expended large sums to secure connections with more than one road. This is not true as to all of the joint mines. The evidence seems to establish the fact that it was the desire of the carriers to secure coal traffic, particularly in the southern Illinois coal field, which led to arrangements being made by them for ingress to large mines, either by building into such mines or by means of trackage agreements or switching-absorption arrangements."

IV. That, in respect to the statement in paragraph three of the petition following the quotation from the December 11, 1922, decision of the Commission to the effect that the "joint mine has available a more extensive and a more varied market for its coal" and reading—

"The mine having established and built up these markets in times of car plenty, the Commission proceeds to take the advantage [fol. 214] away in times of car shortage by the working of the rule as it itself sets it out and puts such mine on a lower basis than the local mine on the road having the larger car supply in every case and down nearer to the level, if not actually below the level, of the average of the local mines on both railroads. The operation of Rule 4 in times of car shortage puts the joint mine in a position of disadvantage by reason of its location"—

these interveners deny that the 100 per cent rule takes away in times of car shortage the great advantage of a more extensive and a more varied market for coal enjoyed by a joint mine. In support of this denial, these interveners refer to the crashingly significant fact that since the initial promulgation of the 100 per cent rule in Illinois, no less than seven complaints have been filed with this Commission by Illinois local operators to compel the railroads to treat their local mines as joint mines in order to secure the very advantages which complainants in the instant cases say are negatived by the 100 per cent rule. And certain of the said Illinois local operators also owned and operated joint mines and knew by experience of the great advantages enjoyed by joint mines and realized and appreciated that said advantages were fully recognized and protected by the 100 per cent rule.

Ridge Coal Mining Co. v. M. P. R. R. Co., 62 I. C. C. 259.
Dering Mines Co. v. Director General, 62 I. C. C. 265.
Hillsboro Coal Co. v. C. C. C. & St. L. Ry. Co., 63 I. C. C. 401.
Benton Coal Mining Co. v. C. B. & Q. R. R. Co., 63 I. C. C. 396.

[fol. 215]

Franklin County Mining Co. v. C. B. & Q. R. R. Co., 63 I. C. C. 396.
Cameron Coal Co. v. M. & E. R. R. Co., 63 I. C. C. 434.
Gallatin Coal & Coke Co. v. L. & N. R. R. Co., 55 I. C. C. 491.

The said Illinois interveners further show that in the Ridge Coal Mining Company Case, the Commission found that—

"Joint mines are treated by the carriers, in the matter of car supply and other transportation services, the same as mines physically located on more than one railroad. Thus in times of car shortage a joint mine may draw cars from each of the railroads to which the mine is joint, whereas a local mine is limited in its supply to the one line serving it. * * *

The record establishes that a joint or junction point mine has a decided advantage over a local mine in the matter of a car supply as well as in other respects."

and in the Dering Mines Company Case that—

"The advantages which would accrue to the complainants if they should prevail would be a better car supply in times of car shortage, due to the opportunity they would then have to draw cars from both lines; an additional route to Chicago and other points reached by both lines; and access by each mine to local markets on both lines instead of only the local markets on its one line as at present * * *. The benefit chiefly sought by complainants, however, is better car supply to the joint mine in times of car shortage. The record shows that the joint mine has an advantage in this respect."

[fol. 216] And these interveners further point out that the record in Docket 12362, Bell & Zoller Coal Co. v. B. & O. S. W. R. R. Co., shows that since the promulgation of the 100 per cent rule joint mine operators, acquainted by experience with the operation of the said rule, have paid two and three times as much for coal lands adjacent to more than one railroad as for coal mines adjacent to a single railroad in order to secure the very advantages which complainants in the instant cases say are negatived by the 100 per cent rule, and further that the said Illinois joint mine operators are willing to and do, expend thousands of dollars in money, cheap railroad-fuel contracts, and in other ways to secure a third and even a fourth railroad connection, although such third and fourth connections would not entitle them (because additional railroad connections do not increase the productive capacity of mines) to place orders for more cars than a local mine of the same rating under the 100 per cent rule, or even to place orders for more cars than a two line joint mine of the same rating under the 150 per cent rule. (Record, 147-148.)

V. That, in respect to the following statement in paragraph 6 of the petition—

"The Commission is without power to predicate an order under the Act to Regulate Commerce in order to equalize the running time of mines. * * * In so far as the decision of the Commission is predicated upon an advantage that the joint mine may have in a labor supply by reason of the greater running time afforded to it under the rule of the Illinois case, the decision is in excess of the [fol. 217] statutory powers of the Commission."

the said Illinois interveners say that the Commission has entered no order designed or intended to equalize the running time or labor supply of mines.

In Docket No. 12362, Bell & Zoller Coal Co. v. B. & O. S. W. R. R. Co., the said Illinois interveners introduced an exhibit (No. 15 corrected) compiled from the annual report of the Illinois Department of Mines for the year ended June 30, 1920, which showed the following among other information:

	Served by one carrier	Served by two or more carriers
Number of Commercial Shipping Mines ...	232	118
Average tons shipper per mine	144,800	257,232
Average number of days worked per mine ..	165.5	185.6

The period covered by the foregoing table was a period during which the 100 per cent rule was in full force and operation. The Illinois interveners conceded in the said case, and they conceded now, that the joint mines in Illinois were and are entitled as a matter of right to advantages in car supply and running time such as are represented by the foregoing comparison, which advantages resulted, now result and will always result from advantages of location on more than one railroad and which are fully recognized and protected by the 100 per cent rule. These Illinois interveners have never requested and do not now request the Commission to deprive joint [fol. 218] mines of such advantages of location or to deprive the said mines of any other right or rights by equalizing the running time or labor supply of joint mines and local mines or in any way whatsoever.

VI. That, in respect to the statement in paragraph seven of the petition—

"That the Commission acted in these cases without sufficient evidence,"

these Illinois interveners join with the West Virginia interveners in pointing out that the burden of presenting sufficient evidence to sustain the allegations of the complaints was upon the complainants and, as the said complainants utterly failed to prove the allegations of the complaints, the Commission properly dismissed the complaints.

In respect to the suggestion that, if the proceedings are reopened, complainants will introduce evidence relating to "experience" under the 150 per cent rule, these Illinois interveners say with the West Virginia interveners that the 150 per cent rule is not in issue in the instant cases, nor was it in issue in the Illinois Joint Mine Cases, and consequently evidence of "experience" under that rule would be irrelevant and immaterial. In this connection reference is made to the following testimony of Mr. Battey, Coal Traffic Manager of the Burlington in Docket No. 12362:

"If we were serving a joint mine with a rating of 100 cars, for example, under the 150 per cent rule they would be entitled to order 150 cars. If the Chicago, Burlington & Quincy and the other roads serving this mine had on any given day an 80 per cent car supply, that would mean that this mine would receive 80 per cent of 150 [fol. 219] cars, or 120 cars, whereas their rating or their capacity is only 100 cars. The proposed rule says that a mine shall not be furnished in excess of its rating or capacity. But it would not be practicable, as we see it, for the interested lines serving a joint mine to exchange information as to their status for that day, and the number of cars they could furnish each mine on a given day. They could not exchange that information in time to prevent the overfilling of orders at those joint mines. Therefore, you would have in that case twenty cars more set in at this mine that they could load, and they would either have to be pulled and taken to some other mine, possibly in time for loading that day, or they would remain at the mine and not be used until the following day"—

and to the following testimony of Mr. Porterfield, General Superintendent of the Illinois Central in the same Docket:

"Under the old 150 per cent rule as published on our railroad, there was a serious waste of cars, because there was no limit to it. The Fairmont rule has a limit, but I do not quite see how we are going to supervise it—or that is, get sufficiently close to it to prevent wasting some cars, because it is impossible for the several railroads in the mining field scattered probably over 100 miles, to get into communication with each other and find out what a mine ordered and what the railroads had furnished. In fact, after we make out estimate of cars that we are able to furnish, frequently something happens—an engine fails, or some delay occurs, that cuts the supply down below what we expected to furnish."

In respect to the suggestion that, if a rehearing is granted in the instant cases, complainants will show that there is less inflation of [fol. 220] ratings at joint mines than at local mines, these Illinois interveners join with the West Virginia interveners in contending that the queston of ratings, their determination, inflation, policing and correction is not in issue in these cases or any of them and that therefore evidence bearing thereon would be irrelevant and immaterial. And these Illinois interveners deny and dispute the statement on page 8 of the petition to the effect that the rating of joint mines are less inflated than the ratings of local mines, but on the contrary these interveners say that the ratings of joint mines are as a rule more inflated than the ratings of local mines, because the carriers, due to fear of traffic reprisals by the joint mines, are generally more lax in determining, policing and correcting the ratings of joint mines than in determining, policing and correcting the ratings of local mines which are compelled to ship all their coal via the single railroad serving them. In support of this denial, these Illinois interveners refer the Commission to the record in Docket No. 12362 where it appears that, in response to persistent complaints to the Car

Service Section of the American Railway Association, the said Section made an investigation of the ratings of all local and joint mines on the St. Louis Division of the Illinois Central Railroad in the autumn of 1920 and developed "extraordinary and gross irregularities, a general lack of integrity and almost a complete absence of policing on the part of the carriers," with the result that the ratings of the said joint mines were reduced an average of 18 per cent, while the ratings of the said local mines were reduced an average of only 3.8 per cent. (Record 504-508; Exhibit 16.)

[fol. 221] Wherefore, the Illinois local operators, having by incorporating the answer of the West Virginia local operators herein and directly, answered each and every material allegation of complainants' petition to reopen, pray the Commission to dismiss the said petition.

Dated at Washington, January 27, 1923.

Abend Coal Company, Benton, Big Muddy Coal Company, Breese-Trenton Mining Company, Carterville & Big Muddy Coal Company, Chicago-Springfield Coal Company, Columbia Collieries Company, Egyptian Coal & Mining Company, Fallon Coal Mines Company, General Coal & Mining Company, Gillespie Coal Company, Kolb Coal Company, Liberty Coal & Mining Company, Lou-Nash Coal & Mining Company, Midway Coal Mining Company, Moffat Coal Company, Mount Olive and Staunton Coal Company, Nashville Mining Company, New Prosperity Coal Company, O. K. Coal Company, Paradise Coal Company, Penwell Coal Mining Company, Perry County Coal Corporation, Rowan Mining Company, St. Louis Coal Company, Security Coal & Mining Company, Spoon River Colliery Company, Star Coal & Mining Company, Superior Mining Company, Wasson Coal Company, By George T. Bell, Their Attorney.

[fol. 222] At a District Court of the United States for the Southern District of West Virginia, continued and held at Charleston, in said District, on Friday, the 10th day of August, A. D., 1923, the following order was made and entered of record:

[Title omitted]

FINAL ORDER AND DECREE

This cause came on to be heard on the 30th day of March, 1923, on the prayers and applications of the complainants for a temporary injunction and for a permanent injunction and on the merits of the amended bill and on the supplemental bill and the answers thereto, answers having been filed by all of the parties defendant other than the United States of America and the Interstate Commerce Commission, and the United States of America and Inter-

state Commerce Commission having stated in open court that they respectively relied upon their motions to dismiss and desire to submit the case without answer or further pleading on behalf of the United States of America and Interstate Commerce Commission and due notice having been given of said hearing on said application for injunctions and on the merits, and said cause having on the evidence submitted been fully heard by three judges, to wit: Hon. C. A. Woods and Hon. Edmund Waddill, Jr., Circuit Judges, and Hon. Geo. W. McClintic, District Judge of the District Court of the United States for the Southern District of West Virginia, duly convened for said hearing and having been argued by all parties by their attorneys.

And it appearing (1) that during the period of Federal control of railroads there had been put into effect by the Director General of Railroads a rule of car distribution, known as Rule 4 of Circular C. S.-31 Revised, applying to coal mines engaged in the shipment [fol. 223] of coal in interstate commerce and served by two or more carriers; (2) that by and pursuant to recommendations of the Interstate Commerce Commission of March 2, 1920 and April 15, 1920, said rule had been kept in force and effect by said carriers until June 21, 1921; (3) that on said date the Interstate Commerce Commission, in a proceeding entitled Fairmont & Cleveland Coal Company, et al., vs. Baltimore & Ohio R. R. Co., et al., 66 I. C. C. 269, in which the complainants herein were petitioners and the carriers defendants herein were parties, found and ruled that said Rule 4 of Circular C. S.-31 Revised was unreasonably and unduly prejudicial to mines served in interstate commerce by two or more carriers and that the defendant carriers should for the future distribute cars according to a rule laid down in said decision of June 21, 1921, of the Commission as the proper and just rule, (to wit: a rule which had been promulgated by the Commission in In Re Irregularities in Mine Ratings, 25 I. C. C. 286) and in said decision of June 21, 1921, directed as follows:

"We shall expect that defendants will promptly amend their car service rules so as to conform with our findings and evidence same by filing copies thereof with us;"

(4) that the defendant carriers, pursuant to said finding, decision and direction so amended their rules and put into effect in place of said Rule 4 the rule then directed to be put into effect, known as the Illinois Rule;

And it further appearing (5) that subsequently the Interstate Commerce Commission, by its own order, without application of the complainants or carriers defendants herein, and the Illinois Rule being still in effect in accordance with the ruling of the Commission in the Fairmont case, directed the Fairmont case to be reopened and consolidated with the case known as the Bell & Zoller case; (6) that on December 11, 1922, the Commission in said consolidated cases rendered a decision and report in which, in reversal of its previous finding and ruling, it found and ruled:

"The present facts considered, we do not conclude upon these records that the rule attacked, Rule 4 of Circular C. S.-31 Revised, [fol. 224] is in principle unreasonable or unduly prejudicial,"

and that

"Our former conclusions in the Fairmont case, based upon a mistaken adherence to and extension of the decision in the Illinois case, are reversed."

and thereupon entered an order incorporating as a part thereof its decision and report, said order being as follows:

"These cases being at issue upon complaints, answers, and intervening petitions on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions therein, which said report is hereby referred to and made a part hereof;

It is ordered, That the complaints in these proceedings be, and they are hereby, dismissed."

and that by said order so incorporating the findings and conclusions of the Commission, Rule 4 of Circular C. S.-31 Revised was again put into effect and made operative and was authorized as the rule of car distribution to be followed by the carriers in lieu of the Illinois Rule, and that under and pursuant to said order of December 11, 1922, the carriers herein then published Rule 4 effective as of February 1 on defendant, Virginian Railway, and as of February 10, 1923, on defendant, Chesapeake & Ohio Railway, in substitution for the Illinois Rule previously put into effect by direction of the Commission.

And it further appearing (7) that the complainants are the owners of mines reached and served by each of the defendant carriers in the transportation of coal in interstate commerce; (8) that the defendant carriers are independent and competing carriers; (9) that said order of the Commission of December 11, 1922, by which said Rule 4 was so again put into effect and authorized was beyond its statutory power and the power which it could constitutionally exercise, and is without warrant of law; that by said order and said Rule 4 promulgated and authorized thereby, the complainants are unlawfully deprived and denied lawful rights of transportation, and without due process of law are deprived of and denied property rights and liberty of contract; that no rule similarly affecting transportation rights has been put into effect by the [fol. 225] Commission on *to* any other commodity and that the fact that the commodity to be transported is coal has no bearing on the transportation rights involved; also that the complainants would be irreparably damaged if said order of the Commission and said Rule 4 are allowed to operate or remain in effect.

It is ordered, adjudged and decreed as follows:

1. That the order of December 11, 1922, of the Interstate Commerce Commission, whereby Rule 4 of Circular C. S.-31 Revised is promulgated and put into effect and authorized is without warrant in law and is null and void.

2. That said order and said Rule 4 of Circular C. S.-31 Revised promulgated and authorized thereby are hereby set aside and annulled.

3. That the United States of America, the Interstate Commerce Commission and the carriers defendant herein, and each of them, are perpetually restrained and enjoined from restricting, in accordance with said order of December 11, 1922 of the Interstate Commerce Commission, and of Rule 4 of Circular C. S.-31; Revised thereby promulgated and put into effect and authorized, the transportation rights in interstate commerce of the complainants and from so restricting said service by or through any other order or rule to the same effect.

Enter above final order and decree as of the 10th day of August, 1923.

Edmund Waddill, Jr., U. S. Circuit Judge. Geo. W. McClintic, Dist. Judge.

[fol. 226] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

Before Woods and Waddill, Circuit Judges, and McClintic, District Judge

OPINION OF THE COURT—Filed Aug. 10, 1923

McCLINTIC, District Judge:

This is a suit in equity, brought under the provisions of the Urgent Deficiency Appropriation Act, approved October 22, 1913, found in 38 Statutes, L. 219.

This case arises under that part of the act which abolished the Commerce Court, and gave jurisdiction, under certain circumstances, to the District Courts.

When an application is made for an injunction, temporary or permanent, under this act, and the District Judge decides that it is a proper case to hear, it becomes his duty to call to his assistance to hear and determine the application, two other judges, one of whom must be a Circuit Judge.

The bill in this cause was presented to the District Judge of the Southern District of West Virginia, on the 29th day of January, 1923, and an order was made, filing the bill of complaint, and set-

ting for hearing the application for the temporary restraining order and interlocutory injunction therein prayed for, at the court room of the United States District Court, at Richmond, Virginia, on Tuesday, February 6, 1923; and further ordered that a copy of the bill be served upon each defendant in said cause.

[fol. 227] This case came on for hearing before the Honorable Charles A. Woods and the Honorable Edmund Waddill, Jr., Circuit Judges, and the Honorable George W. McClintic, District Judge, at Richmond, on the said 6th day of February, 1923.

The defendant, the United States of America, and the defendant, the Interstate Commerce Commission, appeared by counsel, and moved the court to dismiss the bill for want of jurisdiction, and want of equity, for reasons set out in separate written motions, duly filed.

The defendants, the Chesapeake & Ohio Railway Company, and the Virginian Railway Company, each appeared by counsel, and filed answers to the bill in this cause.

The Slab Fork Coal Company, and numerous other companies, as intervening defendants, appeared and by leave of court, filed their intervening petition and motion to dismiss, and later, filed their answer to the bill of complaint herein.

This cause came on to be heard on the said 6th day of February, 1923, upon the bill and exhibits, upon the motions above set out, and the answers filed, and upon the evidence taken in open court, and a temporary restraining order was entered on the 8th day of February, 1923, staying and suspending the operation of a certain decision, ruling and order of the Interstate Commerce Commission, made on the 11th day of December, 1922, and of Rule 4, of Circular C. S.—31 (revised), for the period of sixty days from said date, pending the application for an injunction.

Later, the bill was amended by leave of court, and the answers of the intervening defendants were also amended by leave of court.

On the 30th day of March, 1923, this cause came on for final hearing before the same judges, and was submitted for decision, and an order was entered continuing the temporary stay and suspension until the final decision upon the application.

The bill in this cause was filed by the New River Company and [fol. 228] six subsidiary companies, named as plaintiffs. All the stock of the six subsidiary companies is owned by the New River Company, and such companies operate mines situated in Fayette and Raleigh counties of West Virginia, and in the Southern District thereof. Under the designation of the Interstate Commerce Commission, mines in this region are divided into two classes, to-wit: "Joint Mines" and "Local Mines."

By the designation "Joint Mines," is meant those mines situated on, and entitled to service from, two or more carriers. By the designation "Local Mines," there is meant, those on, or accessible to, one carrier. In this opinion, they will be so designated for the purpose of convenience.

In this region, there are many mines other than those of the plaintiffs, which are joint mines, and there are many mines which are local mines. The intervening petitioners all own local mines.

The railway companies in this particular case which serve these mines, are the Chesapeake & Ohio Railway and the Virginian Railway.

The question which comes up for decision in this case is, whether a joint mine shall be allowed to order such cars as it may need, according to its rated capacity as fixed under the rule, from each railroad, or shall it be allowed only to order such number of cars from both carriers as it would be allowed to order from one carrier.

The history of this question appears from the record in this case to be as follows:

For a period of years prior to the taking of Federal control of railroads, cars were distributed in time of car shortage, to joint mines in the New River fields, by each of the carriers, by what will, for convenience, be referred to as the New River rule; that is, there was no distinction between joint mines and local mines, and cars were distributed to joint mines, according to their proportionate share of the [fol. 229] available car supply in that region, as determined by the rated capacity of the shipper, and without reference to, or inquiry into, the car supply furnished by any other railway. The only limitation placed on the mine was, that these orders for cars based on its rating, should not result in a car supply greater than the capacity of the mines to ship. If, in practice, the orders were so placed as to exceed the capacity of the mine to ship, the penalty rule was provided, in order to limit the car supply for its succeeding days, and ultimately, to be reflected in the rated capacity of the mine for the succeeding months.

This rule here described, has sometimes been called "the two hundred per cent rule."

By the decision of the Interstate Commerce Commission in the Illinois case (In re: Irregularities in Mine Ratings, 25 I. C. C. 286), the commission required that the carrier shall furnish daily to the operators, a statement of the available car supply for the following day. Under the car service rules appended to the bill in this record, the mines place their orders at 4 P. M. on each day, for the following day. Where there are two carriers, this rule, known as the Illinois rule, permits the joint mine to order from each carrier, such number of cars as it may need, based on its rated capacity, not to exceed 75 per cent of such rated capacity. This is sometimes called the "one hundred and fifty per cent rule."

When under the law the government took charge of the railroads, the director general of railroads provided for the distribution of cars for mines in accordance with Circular C. S. 31, Rule 4, hereinafter referred to as Rule 4. In effect, this rule was, and is, that a joint mine could only order from the carriers one hundred per cent of its rated capacity, and stood in no better position than a local mine; indeed, it was not in so good a position as a local mine, unless it ordered all of its cars from the carrier having the greatest supply of cars on that particular day.

This Rule 4 continued to be the measure of car distribution so [fol. 230] long as Federal control of railroads continued, and thereafter, until the decision of the Interstate Commerce Commission on

the 21st day of June, 1921, in the case of Fairmont & Cleveland Coal Company vs. Baltimore & Ohio Railroad Company (62 I. C. C. 629). It was decided by the commission that Rule 4 of Circular C. S.—31 Revised, was unreasonable and unduly prejudicial to joint mines, and unduly preferential to local mines, to the extent that it limited the aggregate orders of the joint commission to one hundred per cent of its rated capacity from both roads, and that for the future, during periods of car shortage, the carrier should distribute cars to the joint mines on their lines, considered in that case, on the basis outlined in the Illinois rule, namely, on days when the joint mine orders cars from only one carrier, and on days on which it orders cars from both carriers, its rating on each of such carriers shall be seventy-five per cent of its full rating, subject to the limitation that it shall on no day be supplied with cars in excess of its maximum rating; and that information should be exchanged between carriers, showing the left-over cars, in order to pervent any abuses that might come therefrom. .

This rule then continued in force until a decision was entered by the Interstate Commerce Commission on the 11th day of December, 1922, in the case of Bell & Zoller Coal Company, et al., vs. Baltimore & Ohio Southwestern Railroad Company, et al., wherein an order was entered and an opinion filed, reversing the opinion in the Fairmont case, supra, and again putting into effect Rule 4 of Circular C. S.-31, revised.

Following this decision, the carriers, the Chesapeake & Ohio Railway Company, and the Virginian Railway Company, arranged to put into effect said Rule 4, the one on the first day of February, 1923, and the other on the 10th day of February, 1923.

This suit was instituted to enjoin such acts on the part of the carriers, and action was taken therein as above set forth, relative to the [fol. 231] temporary restraining order.

The question is raised whether this court has any jurisdiction. It is claimed that it has none, on the ground that the decision of the Interstate Commerce Commission is negative, and no appeal can be taken therefrom, under the ruling of the Supreme Court in the case of Proctor & Gamble Company vs. United States 225; U. S. 286.

This question is raised by the motions to dismiss, filed by the United States and Interstate Commerce Commission, and by intervening defendants.

Without going into a full discussion thereof, we are of opinion that the decision of the Interstate Commerce Commission was in substance and effect affirmative, and that the carriers so understood it, and acted upon it, as an affirmative order, and in consequence thereof, took affirmative action; and the results, so far as the rights claimed by the plaintiffs were concerned, was the same as if the order had been affirmative in form. It is a case in which we must deal with the substance and not the form.

We are therefore of opinion that the Proctor & Gamble case, and other cases of like nature, do not apply here, and that this court has jurisdiction to pass upon the questions raised by the pleadings.

The facts developed by the evidence show very large expenditures

made by the plaintiffs, for the purpose of shipping coal by the two carriers. It is also shown, that the shortage of cars on each carrier continues most of the time, and that the right to ship coal by each carrier, is a valuable property right. If the right to ship by each carrier, and to receive cars from each carrier, on the basis of rated capacity, is denied to the plaintiffs, and to other shippers in like condition, the financial loss will be very great, and the value of their properties will be greatly depreciated. Much larger prices have been paid for mines which had access to the lines of two carriers, than would be thought of, for similar mines, with access only to the line of [fol. 232] one carrier. When there is any real market for coal, car shortage has always existed, and so far as can be foreseen, will always exist. This case would not have arisen, if each carrier had always on hand a sufficient supply of cars, to take care of the demands of each shipper.

The shipper of any commodity who has access to more than one carrier, has a right to choose one carrier, or to divide his goods among two or more carriers, with the advantages naturally belonging to such location, giving such access; and while the Interstate Commerce Commission has, under the law, certain powers of regulation, yet, it is beyond such powers to deprive the shipper of such right, under the guise of regulation, or to limit such right in such way as to amount to the deprivation thereof.

From the adjudged cases, it is plainly to be seen, that the Interstate Commerce Commission has no authority to so exercise its powers so arbitrarily as virtually to transcend such authority conferred, although it may be not technically doing so.

Proctor & Gamble Co. vs. United States supra.

A so-called regulation which destroys at least thirty per cent of the market value of a coal property, certainly transcends such authority. It is a taking of private property without due process of law, by depriving the owner of the power to use it in a legitimate and proper way, for the commercial purpose for which it was designed and developed, by the large extra expenditures of money as shown by the evidence in this cause.

Of course a commercial advantage will accrue to the joint mine, over the local mine, by the abrogation of Rule 4, but in our opinion, that advantage constitutionally belongs to it, by reason of its location, and one that the Interstate Commerce Commission cannot order the carriers to take away from it, and one of which the carrier cannot legally deprive it.

A question analogous to this, was before a three Judge Court in Pennsylvania recently, in the case of the Pennsylvania Railroad Company vs. United States, and the court therein decided, that the [fol. 233] order of the Interstate Commerce Commission was erroneous, and the same was enjoined and suspended.

Davis, Circuit Judge, in the opinion of the Court, in deciding that the industries, situated in a certain zone, where they had access to two carriers, were entitled to such advantage over those out of the zone, and on the line of one carrier, said:

It has been repeatedly held that where one company serves a community or industry located on the tracks of another under a trackage arrangement, the situation in effect is the same as if the former company had extended its own tracks to such community or industry. Commercial Club of Superior, Wis. vs. Great Northern Railway, 24 I. C. C. 96; Penick & Ford v. Director General, 61 I. C. C. 173; Louisville & Nashville Railroad vs. United States, et al., 242 U. S. 60. The industries, therefore, located along the tracks of either company in the zone are in law to be considered as on the individual tracks of both companies, and the industries beyond this zone as located on the tracks of one of the companies only. Consequently, in legal effect, these industries which are within the zone and those without the zone are not similarly situated, but are in a substantially different position. And so the advantage enjoyed by the industries within the zone over those without the zone is not, within the meaning of the Act, an undue or unreasonable preference. Ridge Coal Mining Co. v. Missouri Pacific R. R. Co. 62 I. C. C. 259; Dering Mines Co. et al., vs. Director General, 62 I. C. C. 265; Louisville & Nashville Railroad Company, et al., vs. United States, et al., supra. [fol. 234] "A carrier must use its existing facilities impartially," and the railroads, under the facts in this case, are under no obligation to extend or curtail their facilities. The legal position of the industries in the zone is just the same as though they were located at some other part of the city away from the tracks. An industry selecting a disadvantageous location for reasons justifiable to itself has no right to call upon the carriers to over come such disadvantage at their expense and this is what the industries outside of the zone, so far as the legal situation is concerned, did."

We mean only to hold that Circular C. S.-31, Rule 4 (Revised), and the action of the carriers in putting it in force, is erroneous, and must be enjoined and suspended.

The order will be entered without prejudice to the Interstate Commerce Commission making proper orders relative to reasonable car distribution, to joint as well as local mines, not in conflict with the views hereinbefore expressed.

(Endorsed:) I concur. Edmund Waddill, Jr., U. S. Circuit Judge.

[File endorsement omitted.]

[fol. 235] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

DISSENTING OPINION—Filed Aug. 10, 1923

WOODS, Circuit Judge, dissenting:

The rule for distribution of cars to coal mines other than anthracite mines, in time of shortage, established while the railroads were under Government control, was as follows:

"Copies of orders for cars for a mine that is joint with any other carrier (steam, electric or water) shall be filed with the designated representative of each such carrier, such combinations of orders must not exceed the gross daily rating of the mine."

Joint mines are those served by two or more carriers. Local mines are those served by only one carrier. The rule meant that in car distribution joint mines were to be rated on the same basis as local mines: that is, they were to have no advantage by reason of the double service. After release of the railroads from Federal control the Interstate Commerce Commission recommended that carriers continue the rule in force "until such time as the experience of the carrier or the Commission should dictate other and more appropriate rules for the rating and distribution of cars to coal mines."

On January 11, 1921, the complainants in this case filed com-[fol. 236] plaints before the Interstate Commerce Commission against the Chesapeake and Ohio Railway Company and the Virginian Railway Company alleging the rule hereinbefore quoted, now known as Rule 4 of Circular CS-31, to be unduly preferential to complainants' competitors, the local mines. These cases before the Interstate Commerce Commission, known as Nos. 12083 and 12084, were consolidated with Nos. 12081 and 12082, similar in character. After hearing, the Commission found Rule 4 to be unjustly and unreasonably favorable to local mines; and further found that the joint mines should have a rating in car distribution in the proportion of 150 per cent for the joint mines to 100 per cent for the local mines. That is, the joint mines might have 75 per cent on each carrier as against 100 per cent to the local mines on one carrier. At the conclusion of the opinion the Commission said:

"We have not required that car service rules be filed as tariff schedules. We will not in this proceeding direct that the rules which we herein find to be reasonable be so filed. We shall expect, however, that defendants will promptly amend their car service rules so as to conform with our findings and evidence same by filing copies thereof with us."

No order was made by the Commission. Similar complaints, by coal operators in Indiana and Illinois, had been filed before the Commission, known as Bell & Zoller Coal Company et al., v. Baltimore &

Ohio Southwestern Railroad Company et al., Nos. 12362 and 12399. While these last complaints were pending a petition was filed before the Interstate Commerce Commission by the owners of local mines concerned to reopen the former holding of the Commission in Nos. 12083 and 12084, that the 150 per cent rule in favor of joint mines was just and reasonable. The cases were consolidated. After full hearing of evidence and argument, the Commission reversed its [fol. 237] former conclusions and found that Rule 4—the equality rule without regard to whether a mine was served by one road or more—was just and reasonable. The complaints of the owners of all the joint mines, including those of the complainants in this suit, were dismissed by the following order:

"These cases being at issue upon complaints, answers and intervening petitions on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the complaints in these proceedings be, and they are hereby, dismissed."

There was never any order, or even final determination of the Commission to put into effect any rule or to interfer- with Rule 4 of the railroads. The conclusions announced in its opinion were reopened, reconsidered and changed; but all this was done in one consolidated proceeding, which was never ended until the Commission made the order above quoted. This last order was a final dismissal of the complaints and a refusal to take any action with respect to Rule 4 of the railroads. It was, therefore, a negative order—a mere refusal to interfere with an existing rule. As such it was not reviewable by this court. Proctor & Gamble v. United States, 225 U. S., 282. The action of the Interstate Commerce Commission in the case cited had more the semblance of affirmative action than in this, for there Proctor & Gamble asked the revocation or modification of a rule expressly approved by the Commission, while here, in a continuous proceeding, the Commission merely reached the ultimate conclusion that it would not interfere with an existing rule of the railroads. I, therefore, think the Court had no jurisdiction [fol. 238] whatever to enjoin the railroads from operating under Rule 4 as a rule established by affirmative action of the Interstate Commerce Commission.

Even, however, if Rule 4 had been adopted and put into effect by the Interstate Commerce Commission, it seems to me perfectly clear that this Court has no power to change it. It is apparent from the above statement that the Interstate Commerce Commission has devoted much time and care to the consideration of the justness and reasonableness of the rule. To say the least, it cannot be doubted that the whole matter is debatable and that there are very strong reasons in favor of Rule 4 as distinguished from the 150 per cent rule claimed by the complainants. Even if this Court entertains

the opinion that the action of the Commission was unwise and improper, that affords no ground to say that a prima facie case for an injunction has been made out. Interstate Commerce Commission v. Illinois Cent. R. R., 215 U. S. 452, 478, 30 Sup. Ct. 155, 54 L. Ed. 280; Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075; Manufacturers' Ry. Co. v. United States, 246 U. S. 457; Skinner & Eddy Corporation v. United States, 249 U. S. 557, 562; Seaboard Air Line Ry. Co. v. United States, 254 U. S. 57, 62; Akron, Canton & Youngstown Ry. Co. v. United States, — U. S., — (decided February 19, 1923). The authority of this court is "confined to determining whether there had been violations of the Constitution, or of the power conferred by statute, or an exercise of power so arbitrary as virtually to transcend the authority conferred. Interstate Commerce Commission v. Illinois Central R. Co., 215 U. S. 452, 470; Interstate Commerce Commission v. Union Pacific R. Co., 222 U. S. 541, 547; Proctor & Gamble v. United States, 225 U. S. 282, 297; Interstate Commerce Commission v. Baltimore & Ohio R. Co., 225 U. S. 326, 340." Kansas City So. Ry. v. United States, 231 U. S. 439, 440.

There is no ground for the argument that the refusal of the Interstate Commerce Commission to set aside Rule 4 is an invasion of [fol. 239] any constitutional right of the plaintiffs. Akron, Canton & Youngstown Ry. Co. v. United States, — U. S., —, (decided Feb. 19, 1923). The Court has no power under the statute to regulate interstate commerce; it can only interfere with the action of the Interstate Commerce Commission when the Commission has taken affirmative action contrary to the Constitution or the statute, or has taken such arbitrary action as to virtually transcend its authority. To grant the injunction on this debatable question seems to me to be setting up the judgment of the Court upon a question of fact against the findings of the Interstate Commerce Commission, and that is beyond the power of the Court.

[File endorsement omitted.]

[fol. 240] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

ABSTRACT OF TESTIMONY TAKEN BEFORE JUDGES WOODS, WADDILL AND MCCLINTIC—Filed Oct. 6, 1923

At United States Circuit Court Room,
Richmond, Virginia, February 7, 1923.

SAMUEL A. SCOTT, being first duly sworn testified that he is the Vice-President of the New River Company and General Manager of its subsidiary companies; that the greater portion of the produc-

tion of the mines of the subsidiary companies is from shaft mines; that these shaft mines are located so as to have connection with both the Chesapeake & Ohio and Virginian Railways; that at the time of acquiring these mines the New River Company considered it necessary to receive transportation from more than one outlet, as shaft mines are expensive to open and operate; that the investment of the New River Company in Raleigh and Fayette Counties is over $10,000,000; that shaft mines are more expensive than drift or slope mines; that at the time the New River Company properties were opened the mines generally in operation were drift mines; that since my connection with the company expenditures of over $2,000,000 have been made on the properties in electrifying the mines, building new steel tipples, building new houses, purchasing new locomotives and new mining machines, building a new warehouse and office building, increasing the sales force, and opening offices in New York for the purpose of increasing the production of the mines; that in the making of these expenditures the amount of transportation and transportation facilities was a material element; and the witness would not have reccommended these expenditures if it had not been for the joint service of the two railroads; that [fol. 241] $450,000 has been spent in the purchase of new properties adjacent to the mines with joint service and that these expenditures would not have been justificable if the mines had not had the service of more than one road; that the access of the mines to the two railroads has broadened the market for coal in times of full car supply; that the cutting down of the car supply demoralizes the labor organizations of the mines; that the labor organization of a mine is built up a great expense and it is a serious matter to lose men.

That if Rule 4 is put into effect the heavy investments in the joint mines could not be utilized to their full extent; that part of the miners would leave and part of the houses would be left vacant; that there would not be sufficient tonnage to supply existing contracts and the companies would be exposed to claims and damage suits; that the business of the company would be damaged; that its good will would suffer; that the selling organization would be demoralized; that the cost of mining coal would be increased from 40 to 50 cents a ton.

Cross-examination:

There are about 40 joint mines in the New River District which are not shaft mines; some of the expenditures were made for all of the properties, including the local mines of the companies. Under the rules and the practice that prevails in the New River District, orders for cars by both joint mines and local mines must be placed on the day before the cars are desired for loading and these orders are complied with by the carriers during the night or early morning by placing the cars at the mines. If the joint mines had the right to order more than 100 per cent of their ratings the joint mines would be able to retain their employees but the oppo-

site would be true as to all local mines, the demoralization of the labor organizations at the local mines would be necessarily greater. If the 150 per cent rule continues there will be no change in the present labor situation or between the joint mines and the local mines.

[fol. 242] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

ABSTRACT OF TESTIMONY TAKEN BEFORE JUDGES WOOD, WADDILL, AND MCCLINTIC

At United States Circuit Court Room,
Richmond, Virginia, March 30, 1923.

SAMUEL A. SCOTT, being first duly sworn testified that he is Vice-President of the New River Company and General Manager of its subsidiary companies, and has active charge of the management of the subsidiary companies; that he has acted in this capacity since January 1911; that in 1911 the New River Company owned the capital stick of the White Oak Railway and Piney River & Paint Creek Railroad; that in 1912 these railways were jointly leased by the Chesapeake & Ohio Railway and the Virginian Railway; that in 1917 the White Oak Railway was purchased by the Virginian Railway and that part of the Piney River & Paint Creek Railroad was purchased by the Chesapeake & Ohio Rialway and part by the Virginian Railway; that the investment of the New River Company in the railroad properties referred to as of the date of the sale in 1917 was $845,981.00; that the money consideration received by the New River Company from the Chesapeake & Ohio and Virginian Railways aggregated $727,000.00 or an apparent loss of $118,981.00; that there had been a further loss of $143,745 sustained in operating the properties; that at the time of the sale of the two roads to the Chesapeake & Ohio and Virginian Railways the New River Company was interested in having connections with two trunk lines in order that it might have a full car supply to operate its mines and it was also interested in extending the markets for its coal to the operators served by both trunk lines; that in the sale of the two roads to the Chesapeake & Ohio and Virginian Railways [fol. 243] there was a trackage agreement made between the two trunk lines whereby each line had the right and undertook to serve all the mines covered by the contract for a period of 99 years; that the mines of complainants are equipped to produce and market coal to the extent of their productive capacity; that at the present time there is a shortage of cars on both the Chesapeake & Ohio and Virginian Railways; that the mines of complainants desire to mine and ship coal in the cars of both the Chesapeake & Ohio and Virginian Railways; and that complainants are prepared to furnish all the coal which either or both the defendant carriers can take.

Cross-examination:

Complainants operate 11 joint mines in the New River District. There is a total of about 50 joint mines in that district.

WALTER L. BOOTH, being duly sworn testified that he is Superintendent of Transportation of the Chesapeake & Ohio Railway Company with headquarters at Richmond, Virginia; that he has held this position since 1918; that when he assumed this position Rule 4 of Circular CS-31 Revised was not in effect; that the Chesapeake & Ohio Railway had rules governing the distribution of cars in effect at that time; that these rules did not provide for a differentiation in the distribution of coal cars as between joint mines and local mines; that the Chesapeake & Ohio Railway distributed cars to the joint mines without reference to the car supply furnished to such mines by the Virginian Railway; that when he assumed his present position the Chesapeake & Ohio Railway was under Federal control and Rule 4 of Circular CS-31 Revised was promulgated by him as an official of the United States Railroad Administration; that the distribution of cars under the rule in effect prior and subsequent to Circular CS-31 Revised, was in accordance with the ratings of the mines; that at the end of Federal control the rules of Circular CS-31 were continued in effect on the Chesapeake & Ohio Railway; that subsequently Rule 4 of Circular CS-31 was changed by the Chesapeake & Ohio Railway pursuant to the decision of the Commission [fol. 244] in the Fairmont & Cleveland Coal Company Case with the result that the so-called 150 per cent rule was put into effect; that the 150 per cent rule was continued until February, 1923, when the 100 per cent rule was published to take it out, as I recall it, on account of the Bell & Zoller decision of the Interstate Commerce Commission, but it was nevertheless continued by reason of the restraining order in this proceeding, and is still in force; that prior to the application of Circular CS-31 Revised the ratings of mines on the Chesapeake & Ohio Railway were made without regard to the Virginian ratings of joint mines; that the office of the Superintendent of Transportation is custodian of orders of the Interstate Commerce Commission with respect to the distribution of cars addressed to the Chesapeake & Ohio Railway; that he has been served with a subpœna duces tecum to search his files for any such orders of the Interstate Commerce Commission which limit in any respect the car service to be given to joint shippers of commodities other than coal and that he has not been able to find any such orders.

Cross-examination:

That prior to the promulgation of Circular CS-31 the Chesapeake & Ohio Railway distributed cars to mines regardless of the distribution of the Virginian Railway; that he is not familiar with the manner in which the Virginian Railway obtained its ratings of mines prior to the promulgation of Circular CS-31; that the Virginian, in determining the rating of joint mines, did not take into consideration the shipments made by such mines via the Chesapeake & Ohio

Railway; that the Chesapeake & Ohio Railway rated joint mines the same as local mines.

That he receives copies of the orders of the Interstate Commerce Commission regarding car service which it is his duty to put into effect; that these copies generally come from the General Manager of the company; that usually these orders of the Interstate Commerce Commission are served upon the agents of the railroads in Washington. The witness here identified a copy of Circular CS-10 of March 22, 1920, which contains a rule providing for the distribution of grain cars similar in import as the 100 per cent rules in Cir-
[fol. 245] cular CS-31 regarding coal cars; this rule was not promulgated by the Interstate Commerce Commission but by the American Railway Association, an association of the railways of the country, and whose powers are largely recommendatory; the rule contained in the circular was identical with the one promulgated by the United States Railroad Administration in Circular CS-74 which has been continued in effect on the recommendation of the Interstate Commerce Commission.

[File endorsement omitted.]

[fol. 246] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

PETITION FOR APPEAL BY INTERVENING DEFENDANTS—Filed Oct. 6, 1923

Slab Fork Coal Company, a Corporation; Scotia Coal & Coke Company, a Corporation; South Side Company, a Corporation; Turkey Knob Coal Company, a Corporation; Coal Run Coal Company, a Corporation; Branch Coal Company, a Corporation; Beechwood Coal and Coke Company, a Corporation; Greenwood Coal Company, a Corporation; Laurel Creek Coal Company, a Corporation; Quinnimont Coal Company, a Corporation; Maryland-New River Coal Company, a Corporation; Star Coal & Coke Company, a Corporation; Ephriam Creek Coal & Coke Company, a Corporation; Stover Coal Company, a Coporation.

The above-named intervening defendants, feeling themselves aggrieved by the final order or decree of the District Court and entered August 10, 1923, pray an appeal to the Supreme Court of the United States therefrom.

The particulars wherein they consider the final order or decree erroneous are set forth in the assignment of errors on file to which reference is made.

Intervening defendants pray that a transcript of the record, proceedings, and papers on which the final order or decree was made

and entered, duly authenicated. may be transmitted forthwith to the Supreme Court of the United States.

Geo. T. Bell, Solicitor for Above-named Intervening Defendants.

[File endorsement omitted.]

[fol. 247] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

ASSIGNMENT OF ERRORS BY AND ON BEHALF OF INTERVENING DEFENDANTS, SLAB FORK COAL COMPANY ET AL.—Filed Oct. 6, 1923

The intervening defendants, to-wit: Slab Fork Coal Company, Scotia Coal & Coke Company, South Side Company, Turkey Knob Coal Company, Coal Run Company, Branch Coal Company, Beechwood Coal and Coke Company, Greenwood Coal Company, Laurel Creek Coal Company, Quinnimont Coal Company, Maryland-New River Coal Company, Star Coal & Coke Company, Ephriam Creek Coal & Coke Company, and Stover Coal Company, now come by their counsel, and in connection with their petition for appeal, file the following assignment of errors on which they will rely in their appeal to the Supreme Court of the United States from the final order or decree of the District Court entered August 10, 1923.

I. That the said District Court erred in denying the motion of the United States to dismiss the bill of complaint and in not sustaining the motion.

II. That the said District Court erred in denying the motion of the Interstate Commerce Commission to dismiss the bill of complaint and in not sustaining the motion.

III. That the said District Court erred in denying the motion of the foregoing intervening defendants to dismiss the bill of complaint and in not sustaining the motion.

[fol. 248] IV. That the said District Court erred in ordering, adjudging and decreeing that the order of December 11, 1922, of the Interstate Commerce Commission, be set aside and annulled.

V. That the said District Court erred in ordering, adjudging and decreeing that Rule 4 of Circular CS-31 Revised, be set aside and annulled.

VI. That the said District Court erred in ordering, adjudging and decreeing that the order of December 11, 1922, of the Interstate Commerce Commission is without warrant in law and is null and void.

VII. That the said District Court erred in perpetually restraining and enjoining the Interstate Commerce Commission, the United States of America, and the defendant railroad companies, from

"restricting, in accordance with said order of December 11, 1922, of the Interstate Commerce Commission, and of Rule 4 of Circular CS-31 Revised, thereby promulgated and put into effect and authorized, the transportation rights in interstate commerce of the complainants and their so restricting said service by or through any other order or rule to the same effect."

VIII. The said District Court erred in reaching the conclusion that the order of December 11, 1922, of the Interstate Commerce Commission was in substance and effect an affirmative order.

IX. That the said District Court erred in reaching the conclusion that it had jurisdiction of the subject matter of this suit.

[fol. 249] X. That the said District Court erred in holding that the order of the Interstate Commerce Commission resulted in the taking of Private property without due process of law.

XI. That the said District Court erred in reaching the conclusion that the Interstate Commerce Commission required the defendant carriers to put into effect Rule 4 of Circular CS-31 Revised.

XII. That the said District Court erred in holding that the Interstate Commerce Commission was without power to require the defendant carriers to put in force and effect Rule 4 of Circular CS-31 Revised.

XIII. That the said District Court erred in substituting its judgment for the judgment of the Interstate Commerce Commission concerning a regulation pertaining to the distribution of cars for the transportation of coal in interstate commerce.

XIV. That the said District Court erred in making or entering a final order or decree in which are recited and stated (a) prior proceedings before the United States Railroad Administration during the period of Federal control, (b) prior proceedings before the Interstate Commerce Commission, and (c) a special finding of facts, in violation of Equity Rule No. 71.

XV. That the said District Court erred in finding that under Rule 4 of Circular CS-31 Revised, a joint mine stands in no better position than a local mine.

XVI. That the said District Court erred in finding that, under the so-called Illinois rule, when a joint mine orders cars from only one carrier, its rating on such carriers is 75 per cent. of its full rating.

[fol. 250] XVII. That the Distict Court erred in making the following findings:

"The facts developed by the evidence show very large expenditures made by the plaintiffs, for the purpose of shipping coal by the two carriers. It is also shown, that the shortage of cars on each carrier

continues most of the time, and that the right to ship coal by each carrier, is a valuable property right. If the right to ship by each carrier, and to receive cars from each carrier, on the basis of rated capacity, is denied to the plaintiffs, and to other shippers in like condition, the financial loss will be very great, and the value of their properties will be greatly depreciated. Much larger prices have been paid for mines which had excess to the lines of two carriers than would be thought of, for similar mines, with access only to the line of one carrier. When there is any real market for coal, car shortage has always existed, and so far as can be foreseen, will always exist. This case would not have arisen, if each carrier had always on hand a sufficient supply of cars, to take care of the demands of each shipper.

The shipper of any commodity who has access to more than one carrier, has a right to choose one carrier, or to divide his goods among two or more carriers, with the advantages naturally belonging to such location, giving such access; and while the Interstate Commerce Commission has, under the law, certain powers of regulation, yet, it is beyond such powers to deprive the shipper of such right, under the guise of regulation, or to limit such right in such way as to amount to the deprivation thereof.

From the adjudged cases, it is plainly to be seen, that the Interstate Commerce Commission has no authority to so exercise its powers [fol. 251] so arbitrarily as virtually to transcend such authority conferred, although it may be not technically doing so.

A so-called regulation which destroys at least thirty percent of the market value of a coal property, certainly transcends such authority. It is a taking of private property without due process of law, by depriving the owner of the power to use it in a legitimate and proper way, for the commercial purpose for which it was designed and developed, by the large extra expenditures of money as shown by the evidence in this cause.

Of course a commercial advantage will accrue to the joint mine, over the local mine, by the abrogation of Rule 4, but in our opinion, that advantage constitutionally belongs to it, by reason of its location, and one that the Interstate Commerce Commission cannot order the carriers to take away from it, and one of which the carrier cannot legally deprive it."

XVIII. That the District Court erred in reaching the conclusion that Rule 4 of Circular CS-31 Revised in effect deprives a joint mine of the right to order and receive cars from one or both of the carriers serving it according to its rated capacity, or deprives a joint mine of its right to tender the amount of coal represented by its gross daily rating to one or both of the carriers serving it. It is insisted that no joint mine has a right to transportation or to receive cars for transportation unless it makes an actual or constructive tender of sufficient coal to load the number of cars ordered and, as the daily rating of a joint mine presents its maximum capacity to tender coal for shipment, it also represents its maximum capacity to make reasonable requests for cars.

XIX. That the said District Court erred in not holding that the question whether Rule 4 of Circular CS-31 Revised was and is a valid

rule, or was and is unjust, unreasonable and unduly prejudicial was [fol. 252] and is one within the administrative functions of the Interstate Commerce Commission and that the said District Court had and has no jurisdiction to determine said question or to grant relief in respect thereto.

XX. That the District Court erred in not holding that the right of a joint mine to order cars and receive transportation is under paragraph 4, of Section 1 of the Interstate Commerce Act, conditioned upon a reasonable request being made therefor, and that the question whether aggregate orders of a joint mine for more cars than the number represented by 100 per cent of its gross daily rating are unreasonable requests for transportation is one within the administrative functions of the Interstate Commerce Commission and not subject to review by the District Court.

XXI. That the District Court erred in not holding that, as a matter of law, the aggregate requests of a joint mine for more than 100 per cent of its gross daily rating of cars are unreasonable to the extent that they exceed 100 per cent of the gross daily rating of the mine in that the requests for the excess cars are unaccompanied by actual or constructual tenders of coal ready for shipment.

XXII. That the District Court erred in not holding that the gross daily rating of a joint mine represents its maximum daily capacity to produce coal, its maximum daily capacity to tender coal for shipment, and therefore the maximum daily measure of its right to order cars whether such orders are addressed to one or both of the carriers serving it.

XXIII. That the said District Court erred in not holding that the question whether the aggregate daily rating of a joint mine to order cars from one or both of the carriers serving it shall be measured by its gross daily rating or capacity to produce and tender coal for ship- [fol. 253] ment is a just and reasonable or unjust and unreasonable rating, is one within the administrative functions of the Interstate Commerce Commission and not subject to review by the District Court.

XXIV. That the said District Court erred in not holding that a rule which limits the daily orders for cars of a joint mine to 100 per cent of its gross daily rating on both the carriers serving it is required by paragraph 12 of Section 1 of the Interstate Commerce Act.

Wherefore, intervening defendants pray that the final order or decree of the District Court may be reversed, annulled, and set aside with directions that the permanent injunction shall be dissolved and the bill of complaint dismissed, and for such other and further relief as may be deemed meet and just.

George T. Bell, Solicitor for Intervening Defendants

[File endorsement omitted.]

[fol. 254] At a District Court of the United States for the Southern District of West Virginia

[Title omitted]

Order Allowing Appeal of Slab Fork Company et al., Intervening Defendants

In the above-entitled cause, the Slab Fork Coal Company, et al., intervening defendants, having made and filed their petition praying an appeal to the Supreme Court of the United States from the final order or decree of the District Court, and having also made and filed an assignment of errors, and having in all respects conformed to the statute and rules of court in such case made and provided:

It is ordered and decreed that the appeal be, and the same is hereby, allowed as prayed and made returnable within thirty (30) days from the date hereof, and the clerk is directed to transmit forthwith a properly authenticated transcript of the record, proceedings and papers on which said order or decree was made and entered to the Supreme Court of the United States.

Geo. W. McClintic, United States District Judge.

[fol. 255] Citation on Appeal—Omitted in printing

Service of the foregoining citation and the receipt of a copy [fol. 256] thereof is hereby acknowledged this 6th day of October, 1923.

James W. Carmalt, Solicitors for All Appellees.

[fol. 257] In the District Court of the United States for the Southern District of West Virginia

Notice of the Appeal of the Slab Fork Coal Company et al., Intervening Defendants—Filed Oct. 6, 1923

[Title omitted]

To United States of America, Interstate Commerce Commission, the Chesapeake & Ohio Railway Company, and the Virginian Railway Company, Defendants:

You are hereby notified that the Slab Fork Coal Company, et al., intervening defendants in the above-entitled cause will prosecute an appeal from the final order or decree of the District Court, entered August 10, 1923, in the above-entitled cause, in which you are the defendants, to the Supreme Court of the United States, to reverse the decree rendered in the said cause.

Geo. T. Bell, Solicitor for the Slab Fork Coal Company et al., Intervening Defendants.

Service of a true copy of the foregoing notice is hereby acknowledged this 5th day of October, A. D. 1923.

——— ———, Solicitor for the Chesapeake & Ohio Railway Company. ——— ———, Solicitor for the Virginian Railway Company. Blackburn Esterline, Assistant to the Solicitor [fol. 258] General. J. Carter Fort, Solicitor for Interstate Commerce Commission.

Service of a true copy of the foregoing notice was made on W. S. Bronson, Solicitor for the Chesapeake & Ohio Railway Company, Richmond, Virginia, and W. H. T. Loyall, Solicitor for the Virginian Railway Company, Norfolk, Virginia, by depositing the same in the United States mail, addressed as aforesaid with postage prepaid at 4 P. M. on October 4, 1923.

Geo. T. Bell, Solicitor for Intervening Defendants.

[File endorsement omitted.]

[fol. 259] In the District Court of the United States for the Southern District of West Virginia

[Title omitted]

Notice of Appeal—Filed Oct. 6, 1923

To the Honorable E. D. Englend, Attorney General of the State of West Virginia:

You are hereby notified that the Slab Fork Coal Company, et al., intervening defendants in the above-entitled cause, have taken an appeal from the final decree of the District Court to the Supreme Court of the United States and that the order allowing the appeal makes the same returnable within thirty (30) days from the date of the order.

This notice is given you pursuant to Urgent Deficiencies Act, October 22, 1913, (38 Stat. 221).

Geo. T. Bell, Solicitor for Intervening Defendants.

October 4, 1923.

I hereby acknowledge receipt of a copy of the above notice this 5th day of October, A. D. 1923.

E. T. England, Attorney General of the State of West Virginia, By R. Dennis Steed, Assistant.

[File endorsement omitted.]

[fols. 260 & 261] BOND ON APPEAL FOR $1,000—Filed and Approved Oct. 15, 1923

[fol. 262] AT A DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

ORDER ALLOWING APPEAL OF SLAB FORK COAL COMPANY ET AL., INTERVENING DEFENDANTS

In the above-entitled cause, the Slab Fork Coal Company, et al., intervening defendants, having made and filed their petition praying an appeal to the Supreme Court of the United States from the final order or decree of the District Court, and having also made and filed an assignment of errors, and having in all respects conformed to the statute and rules of court in such case made and provided:

It is ordered and decreed that the appeal be, and the same is hereby, allowed as prayed and made returnable within thirty (30) days from the date hereof, and the clerk is directed to transmit forthwith a properly authenticated transcript of the record, proceedings and papers on which said order or decree was made and entered to the Supreme Court of the United States.

The petitioners shall not have the benefit of this order until they, or some one for them, shall enter into the proper appeal bond in the penalty of one thousand dollars before the clerk of this court, with surety to be approved by the court, or one of the judges thereof, payable and conditioned as the law directs.

Edmund Waddill, Jr., United States Circuit Judge. Geo. W. McClintic, United States District Judge. Octo. 17, 1923.

[fol. 263] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

STIPULATION FOR TRANSCRIPT OF RECORD—Filed Oct. 18, 1923

It is hereby agreed and stipulated that the record in the above-entitled cause on appeal to the Supreme Court may be limited to the following matter:

1. Bill of complaint as amended and supplemental bill.
2. Intervening petition of Slab Fork Coal Company, et al.
3. Motion of the United States to dismiss.
4. Motion of the Interstate Commerce Commission to dismiss.

5. Motion of the Intervening Defendants to dismiss, with exhibit thereto attached.

6. Interlocutory order.

7. Dissenting opinion of Circuit Judge Woods.

8. Answer of Intervening Defendants, Slab Fork Coal Company, et al., as amended, with exhibits thereto attached.

9. Order filing intervening petition, motion to dismiss and answer of Slab Fork Coal Company, et al.

10. Answer of the Chesapeake & Ohio Railway Company.

11. Answer of the Virginian Railway Company.

12. Abstract of the testimony of Samuel A. Scott and Walter L. Booth hereto attached.

13. Order continuing temporary restraining order.

14. Opinion of the Court by District Judge McClintic.

[fol. 264] 15. Final decree entered August 10, 1923.

16. Petition for appeal filed by Slab Fork Coal Company, et al.

17. Order allowing appeal of Slab Fork Coal Company, et al.

18. Citation of appeal by Slab Fork Coal Company, et al.

19. Notice of appeal of Slab Fork Coal Company, et al. to defendants.

20. Notice of appeal of Slab Fork Coal Company, et al. to Attorney General of West Virginia.

21. Appeal bond filed by Slab Fork Coal Company, et al.

22. This stipulation.

James W. Carmalt, Solicitor for Complainants New River Company et al. George T. Bell, Solicitor for Slab Fork Coal Company et al.

[File endorsement omitted.]

[fol. 265] UNITED STATES OF AMERICA,
Southern District of West Virginia, ss:

CLERK'S CERTIFICATE

I, Ira H. Mottesheard, Clerk of the District Court of the United States for the Southern District of West Virginia, do hereby certify that the foregoing is a true and complete transcript of the record and proceedings, in accordance with the stipulation of counsel, in

the case of The New River Company, a corporation, et al., vs. The Chesapeake & Ohio Railway Company, a corporation, et al., and now of record and on file in my office.

In Testimony Whereof I hereto set my hand and the seal of said Court, at Charleston, in said District, this 30th day of October, A. D., 1923, and in the 148th year of the Independence of the United States of America.

Ira H. Mottesheard, Clerk D. C. U. S., S. D. W. Va. (Seal of District Court United States, Southern District West Virginia.)

Endorsed on cover: File No. 29,938. S. West Virginia D. C. U. S. Term No. 628. Slab Fork Coal Company, Scotia Coal & Coke Company, South Side Company, et al., appellants, vs. New River Company, White Oak Fuel Company, Stuart Colliery Company, et al. Filed November 6th, 1923. File No. 29,938.